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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 197.

EDWARD S. THOMAS, LLOYD M. HOWELL, AND [illegible] P. FITCH, TRUSTEES IN BANKRUPTCY OF JACOB BERRY AND HAROLD L. BENNETT, INDIVIDUALLY AND AS JACOB BERRY & COMPANY, PETITIONERS,

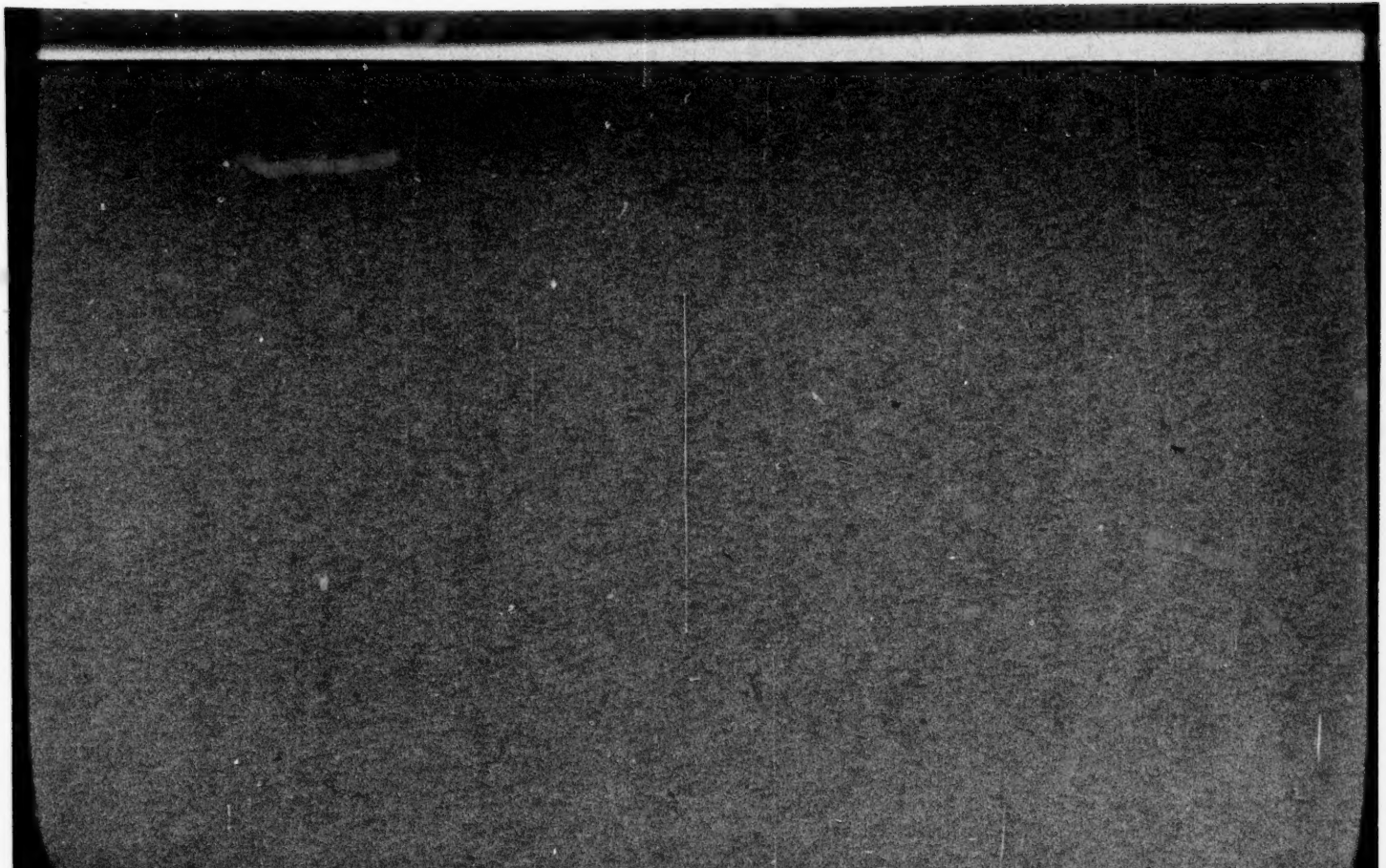
vs.

ANNA D. TAGGART ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 19, 1907.
CERTIORARI AND RETURN FILED MARCH 20, 1907.

(20,524.)



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a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of JACOB BERRY & COMPANY, Bankrupts.

EDWARD S. THOMAS ET AL., Petitioners.

Petition to Review

Order of the District Court of the United States for the Southern District of New York.

1 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of JACOB BERRY and HAROLD L. BENNET, Individually, and as Copartners Trading under the Name of Jacob Berry & Company, Bankrupts.

In the Matter of Claims to the Surplus Arising from the Sale of Securities Pledged to the Hanover National Bank.

SIRS: Please take notice that we have this day presented to this Court and filed with the Clerk thereof the annexed petition of the Trustees in Bankruptcy of Jacob Berry & Company for re-
2 view by this Court of a certain order of the Honorable George C. Holt, one of the Judges of the United States District Court for the Southern District of New York, filed and entered with the Clerk of said Court on the 23d day of October, 1905, and a motion will be made before this Court for a review of the said order, and for such other and further relief in the premises as may be just.

Dated New York, November 1st, 1905.

Yours, etc., JAMES, SCHELL & ELKUS,
Att'ys for Trustees, 50 Pine Street, Borough of Manhattan, City of New York.

To Simpson, Thatcher & Bartlett, Esqs.,
Att'ys for Anna D. Taggart,
25 Broad Street,
New York City.
Sweezy & Glover, Esqs.,
Att'ys for Harris Filson,
62 William Street,
New York City.
Everett T. Chappell, Esq.,
Att'y for George Donaldson,
335 Broadway,
New York City.
Albert W. Putnam, Esq.,
Att'y for George E. Hall,
32 Liberty Street,
New York City.
Samuel Bitterman, Esq.,
Att'y for William C. Bowers,
280 Broadway,
New York City.

3 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of JACOB BERRY and HAROLD L. BENNET, Individually, and as Copartners Trading under the Name of Jacob Berry & Company, Bankrupts.

In the Matter of Claims to the Surplus Arising from the Sale of Securities Pledged to the Hanover National Bank.

To the Honorable United States Circuit Court of Appeals for the Second Circuit:

The petition of Edward S. Thomas, Lloyd M. Howell and Ashbel P. Fitch respectfully shows this Court:

I. That heretofore, on or about the 4th day of January, 1905, your petitioners were appointed Trustees in Bankruptcy of the above-named bankrupts, and duly qualified by the giving of the
4 bond required of them, which was duly approved, and they have since been acting in the performance of their duties as such Trustees.

II. That in the course of the administration of said estate an order was made by the Honorable George C. Holt and entered on the 25th day of March, 1905, referring to Stanley W. Dexter, as Special Commissioner, the adjustment, determination and adjudication of certain claims and liens made to certificates of stock and the proceeds thereof which were pledged to the Hanover National Bank, and the said order required all claimants who asserted any title or lien to certificates of stock or their proceeds to present their claims to the Referee in Bankruptcy before a certain date or have their rights to said stock foreclosed.

III. Thereafter several claimants presented claims to the said certificates of stock and their proceeds, and testimony and proof was offered in reference to the several claims, and the matter was duly submitted to the said Special Commissioner for his consideration. On the 22d day of August, 1905, the said Special Commissioner filed a report, wherein he found that the claimants Anna D. Taggart, Harris Filson, George E. Hall, George Donaldson, Rudolph Treiss, William C. Bowers and William D. Allen were entitled as against the Trustees in Bankruptcy to recover certain certificates of stock, or were entitled to a lien on the funds in the hands of the Trustees. The said Special Commissioner also found that John M. Davies, Malcolm B. Butler and Edward T. Little were not entitled to said certificates or money and that their claims should be dismissed.

IV. The report of the Special Commissioner was brought
5 on for hearing before the Honorable George C. Holt, District Judge for the Southern District of New York, on the 4th day of October, 1905, and such proceedings were had as resulted in an order made and entered in the United States District Court for the Southern District of New York on the 23d day of October, 1905, confirming the report of the said Special Commissioner as to the claims of Anna D. Taggart, Harris Filson, George Donaldson, George E. Hall and William C. Bowers, and directing the Trustees in Bank-

ruptcy of the bankrupt firm to deliver over certain certificates of stock or the proceeds thereof to the said claimants.

V. That your petitioners respectfully submit that the said order of the 23d day of October, 1905, is erroneous and unlawful and without warrant of law, and your petitioners are aggrieved by the said order of the United States District Court for the Southern District of New York in the making whereof your petitioners are advised that manifest errors of law have occurred which ought to be reviewed by this Court in the following respects:

(1.) The Honorable Special Commissioner and the Honorable District Judge erred in finding that Anna D. Taggart, George E. Hall, William C. Bowers were entitled to certain certificates of stock, and that George Donaldson and Harris Filson were entitled to a lien on certain moneys in the hands of the Trustees in Bankruptcy.

(2.) That the Honorable District Court erred in confirming the report of the Honorable Stanley W. Dexter, Special United States Commissioner, as to the claims of Anna D. Taggart, Harris Filson, George Donaldson, George E. Hall and William C. Bowers.

(3.) That the Honorable Special Commissioner and the
6 Honorable District Judge erred in finding that the relation which existed between the five said claimants and the bankrupts was that of pledgor and pledgee, and that the said customers were entitled to the restoration of their certificates of stock or the proceeds thereof.

(4.) That the said Special Commissioner erred in his report, and the Honorable District Judge erred in his finding, that under the form of the receipt accepted by these claimants, and under the form of the contract provided between the said five claimants and the bankrupts, that the said claimants were entitled to recover from the Trustees in Bankruptcy the certificates of stock or the proceeds.

(5.) That the Honorable Special Commissioner and the Honorable District Judge erred in failing to find that the relation which existed between the bankrupts and the said five claimants was that of debtor and creditor and that the sole claims which the said claimants have against this estate are claims as general creditors.

(6.) That the Honorable Special Commissioner and the Honorable District Judge erred in finding that the title to the certificates of stock deposited by the said five claimants remained in the said claimants, and that the claimants were therefore entitled to the return of the said certificates or to the proceeds realized from their sale.

(7.) That the Honorable Special Commissioner and the Honorable District Judge erred in finding that the deposit of the certificates of stock by the said five claimants was a bailment and not a sale of the said certificates by virtue of the contract which existed between the bankrupts and the said claimants.

7 (8.) That the Honorable Special Commissioner and the Honorable District Judge erred in finding that George E. Hall was entitled to the return of his certificate of stock, and in failing to find that by virtue of filing of proof of claim in the sum of $1,850 and voting thereon for Trustee, which proof of claim included the certificate of stock now sought to be reclaimed, constituted an

election of remedies which barred the claimant from reclaiming the stock, and which was a waiver of any right to regard the certificate as the property of the said Hall.

(9.) That the Honorable Special Commissioner and the Honorable District Judge erred in allowing the claim of Harris Filson, and in failing to find that the delivery of the certificate of Atchison stock as the purchase price of Pennsylvania stock by Harris Filson passed the title to the said certificates to the bankrupts and reduced the said claimant to the relation of a general creditor of the estate.

(10.) That the Honorable Court erred in finding that the contract which existed between the said five claimants and the bankrupts did not pass title in any certificates deposited by the claimants as collateral security to the bankrupts, and in failing to find that the only claim which the said claimants now have as against the Trustees is a claim as general creditor.

Wherefore, your petitioners pray that the order of the said District Court be reviewed by this Court and that the same be reversed, vacated and in all respects set aside, and that it be decreed by this Court that the Trustees in Bankruptcy are entitled to the possession of the certificates of stock, and that the title to said certificates is in the said Trustees, and that the said claimants have no lien
8 upon any funds in the hands of the said Trustees in Bankruptcy, and that the motion of the said Trustees for the dismissal of the said claims of Anna D. Taggart, Harris Filson, George Donaldson, George E. Hall and William C. Bowers be granted, and that the overruling of the report of the said United States Special Commissioner with respect to said claims be granted, and that your petitioner may have such other and further relief as to this Court may seem just and proper in the premises.

And your petitioners will ever pray.

JAMES, SCHELL & ELKUS,
Att'ys for Trustees.

Office and Post Office Address, 50 Pine Street and 346 Broadway, Borough of Manhattan, City of New York.

STATE OF NEW YORK, *County of New York, ss:*

Edward S. Thomas, being duly sworn, deposes and says: That he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

_____,
Notary Public.

STATE OF NEW YORK, *County of New York, ss:*

Ashbel P. Fitch, being duly sworn, deposes and says: That he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his

own knowledge except as to matters therein stated to be
9 alleged on information and belief, and as to those matters he believes it to be true.

ASHBEL P. FITCH.

Sworn to before me this 2d day of November, 1905.
[SEAL.] EUGENE J. HUGHES,
Notary Public, New York County.

United States Circuit Court of Appeals for the Second Circuit.

In the Matter of JACOB BERRY & Co., Bankrupts.

Affidavit of Service on Person in Charge.

STATE OF NEW YORK, *County of New York, ss:*

Archie G. McBride, being duly sworn, says that he is of the age of eighteen years and upwards; that on the 2d day of November, 1905, between the hours of 1 P. M. and 2 P. M., he served a copy of the annexed petition for review on Samuel Bitterman, the attorney for William C. Bowers, and Sweezy & Glover, the attorneys for Harris Filson, in the above-entitled action, at their offices, No. 280 Broadway and 62 William Street, in the City of New York, Borough of Manhattan, by delivering a copy of the same to and leaving
10 the same with a person in charge of their said offices, said attorneys being absent therefrom at the time of said service.

ARCHIE G. McBRIDE.

Sworn to before me this 2d day of November, 1905.
[SEAL.] NATHANIEL WALKOF,
Notary Public No. 178, *New York County.*

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—In the matter of Jacob Berry & Harold L. Bennet, individually and as copartners trading under the firm name of Jacob Berry & Co., Bankrupts.—(Original.)—Petition for Review.—James, Schell & Elkus, Attorneys for Trustees, 50 Pine Street, Borough of Manhattan, New York City.—Copy Received Nov. 2/05.—Simpson, Thacher & Bartlett, Attorneys for Anna D. Taggart.—Rec'd a copy Nov. 2/05.—Albert W. Putnam, Att'y for Geo. E. Hall.—Copy Rec'd Nov. 2/05. E. T. Chappell, Atty. for Geo. Donaldson.—United States Circuit Court of Appeals, Second Circuit.—Filed Nov. 2, 1905.—William Parkin, Clerk.

11 UNITED STATES OF AMERICA,
Southern District of New York, ss:

In the Matter of JACOB BERRY & COMPANY.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby

certify that the foregoing is a correct transcript of the record of the District Court in the above entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 27th day of January, in the year of our Lord one thousand nine hundred and six and of the Independence of the said United States the one hundred and thirtieth.

[SEAL.] THOMAS ALEXANDER, *Clerk.*

12 United States District Court, Southern District of New York.

In the Matter of BERRY & COMPANY, Bankrupts.

Upon reading and filing the annexed petition of Edward S. Thomas, verified the 16th day of March, 1905, and upon the order of adjudication entered herein, and upon all the other papers and proceedings had herein, let R. L. Treiss, N. C. Bowers, W. D. Allen, Anna D. Taggart, George E. Hall, J. M. Davies, Edward A. Spooner, Malcolm B. Butler, and all other persons who may assert any claim in reference to the ownership or title to certain certificates of stock pledged to the Hanover National Bank by Jacob Berry & Company, or the proceeds thereof, or any surplus that remained in the hands of said Hanover National Bank after the sale of securities pledged to and sold by said bank, show cause before me at a stated term of this court, to be held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 20th day of March, 1905, at 10:30 in the forenoon, or as soon thereafter as counsel can be heard, why the prayer of the annexed petition of Edward S. Thomas should not be granted, and why an order should not be made directing all the aforesaid claimants, and all the other persons making any
13 claim to any said certificates of stock, or claiming any right, title or interest in and to said certificates of stock now in the possession of the Trustees or any of the certificates of stock mentioned in the annexed Exhibit "A" pledged to the Hanover National Bank by Jacob Berry & Company, or the proceeds of said certificates of stock, filed their claims to said stock in the office of the Honorable Stanley W. Dexter, Referee in Bankruptcy, No. 71 Broadway, Borough of Manhattan, City of New York, on or before the 8th day of April, 1905, and why, in case any claimant or claimants fail to so file his or their notice of claims on or before the 8th day of April, 1905, or does not appear before the said Referee or institute proceedings before said Referee in reference to said stock or the proceeds thereof before that time, any such claimant should not be forever barred from making any claim to any of said stock that may thereafter have been distributed to other claimants; and why an order should not be made referring to the Honorable Stanley W. Dexter, Referee in Bankruptcy, the determination of all the rights, titles and interests, if any, in and to any and all said certificates of stock or the proceeds thereof, and to determine the rights, titles and interests of all said claimants, and all persons whatsoever in any of the said

certificates of stock set forth in schedule hereto annexed, or the proceeds thereof, and to determine the amounts, if any, which any claimants who prove ownership to stock not sold by said bank and in the possession of said Trustees, shall contribute to the losses sustained by those whose stock is not now in the possession of said Trustee, but was sold by said Hanover National Bank under its rights as pledgee, and why said Referee should not determine the amounts, if any of such contribution, and should not, in all respects whatsoever, adjust, determine and adjudicate the rights, titles, interests,
14 equities, claims and liens in or to any such certificates of stock or surplus in money realized by the said Hanover National Bank upon the sale of a portion of said stock and delivered to the Trustees; and why said Referee should not proceed upon said 8th day of April, 1905, and thereafter, to take testimony as to such rights, titles, interest and equities of the various claimants. Let all said claimants and all other persons show cause at said time and place why said Trustees in Bankruptcy herein should not have such other and further relief as may be proper and just in the premises, and why the expenses, charges, costs and fees of the proceedings to determine the titles, rights, interests and equities in and to said certificates of stock or the proceeds thereof should not be chargeable to said stock and the proceeds thereof; and it is further

Ordered that, pending the determination of this order to show cause, the various claimants herein are stayed and enjoined from taking any proceedings to gain possession of any of the said stock set forth in the annexed Exhibit "A," or the proceeds thereof, other than the filing of their claims as herein provided.

Service of a copy of this order to show cause and the annexed petition shall be sufficient if delivered to the known claimants mentioned in the said order, or their attorneys, on or before the 17th day of March, 1905.

Dated New York, March 16, 1905.

GEO. C. HOLT, *J.*

15 United States District Court, Southern District of New York.

In the Matter of JACOB BERRY & COMPANY, Bankrupts.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Edward S. Thomas respectfully shows this Court:

I. That he is one of the three Trustees in Bankruptcy, duly appointed, of the above estate, and has qualified as such Trustee by giving the required bond.

II. That during the month of November, 1904, the above named bankrupts procured a loan from the Hanover National Bank of the City of New York in the sum of forty-five thousand dollars ($45,000), and deposited with the said bank, as collateral security for such loan, a large number of certificates of stock of various kinds; that on or about the 26th day of November, 1904, the said Hanover National Bank sold a large portion of these securities so deposited

pursuant to their agreement with the bankrupts, to reimburse themselves for the amount of this loan, and delivered back to Edward S. Thomas, as Receiver in Bankruptcy herein, the excess that
16 remained over and above the amount of the said loan of $45,000. The said bank restored to the estate herein the sum of six thousand, three hundred and ten and 41/100 dollars ($6,310.41), representing the balance on deposit with said bank and the surplus remaining after the sale of the pledged certificates of stock, and the following shares of stock:

Certificate #6460, representing two (2) shares of New York, New Haven & Hartford R. R. Stock.

Certificate #15546, representing fifty (50) shares of United States Steel, Preferred, stock.

Certificate #30563, representing thirty-three (33) shares of United States Steel, Preferred, stock.

Certificate #36205, representing thirty (30) shares of United States Steel, Preferred, stock.

Certificate #A-2229, representing fifty (50) shares of Chicago-Alton stock.

Certificate #A-2264, representing eighty (80) shares of Cincinnati, Indianapolis & Louisville stock.

Certificate #47114, representing ten (10) shares of United States Steel, Common, stock.

III. Your petitioner further shows that subsequent to the said sale and return to the Receiver of these surplus moneys and stock, certain customers of the bankrupt brokers laid claim to the funds, on the ground that the said certificates of stock were the property of such customers, having been delivered to Jacob Berry & Company as security for running accounts, and that the said stock was pledged by Jacob Berry & Company to the Hanover National Bank without the consent of these customers, who assert to your petitioner an unqualified ownership in the said stock, and, in such cases as there are any moneys due the bankrupts from these customers, they have offered to pay this sum of money, and
17 demand the return of their shares of stock, which are now in the Trustee's hands.

IV. In addition to the stock returned to your petitioner as Trustee by the said Hanover National Bank, to which a claim has been made by the several claimants, several customers of the bankrupt brokers assert an ownership in the certificates of stock which were sold by the Hanover National Bank, and claim that said certificates were delivered to Jacob Berry & Company solely as security for running accounts, without any authority being given to the said bankrupt brokers to pledge or hypothecate these stocks, and that said hypothecation was wrongful as to them, and they demand a share in the said surplus moneys realized from the sale of stock by the Hanover National Bank; that reclamation proceedings have been instituted in this Court, both by the claimants, whose alleged certificates have been returned by the Hanover National Bank to your petitioner and by claimants whose alleged certificates were sold by the Hanover National Bank, and, in the

opinion of your petitioner, it is impossible to determine the equities as between these parties, unless all persons having any interest in the various shares of stock returned from the Hanover National Bank and the surplus funds returned by said bank are brought together into one proceeding, and their rights to the said stock and surplus moneys be determined with all the parties before the Court; that the names of the claimants who assert ownership to the stock now in the possession of the Trustees are N. C. Bowers, Anna D. Taggart, J. M. Davies, Edward A. Spooner, Malcolm B. Butler and the names of the persons who claim an interest in said proceedings, by virtue of the fact that their certificates of stock were sold by the Hanover National Bank, are R. L. Treiss, W. D. Allen and George E. Hall.

18 V. Your petitioner, from the information in his possession, is unable to determine the persons who deposited a large number of these shares of stock, sold by the Hanover National Bank, with Jacob Berry & Company, and, accordingly, he is ignorant as to what further claims may be made by other persons than those who have already notified him, and he annexes hereto, as Exhibit A, a list of all the shares of stock which were pledged to the Hanover National Bank and sold by the said bank on the 26th day of November, 1904. Your petitioner desires that any persons or claimants whose certificates appear in this said list shall notify the Trustees of their claim and take part in these proceedings, so that equity and justice may be done between all the parties.

VI. Your petitioner has been advised by his attorneys that he cannot deliver any of the pledged stock which has been returned by the Hanover National Bank to any claimant who may prove his title, in view of the fact that a large amount of stock belonging to customers was actually sold. He is informed that before the delivery of any shares of stock to which title may be shown, it will be necessary for the claimant to contribute to the losses suffered by those whose stock was sold by the said bank; so that both those whose stock was not sold and those whose stock was sold shall suffer a like loss. In view of this advice, your petitioner desires that the amount to be contributed by the various claimants who prove title to stock now in possession of the Trustees and pledged to the Hanover National Bank, shall be ascertained, so that equity shall be done between all those customers of Jacob Berry & Company whose stock was pledged without authority by the said bankrupts to the Hanover National Bank.

19 VII. That as to all the claims of ownership which have been made to the various certificates of stock deposited with the Hanover National Bank, your petitioner is ignorant and has not knowledge or information sufficient to form a belief as to the truth of the asserted claims. He therefore desires that these claimants give proof as to the allegations of ownership made by them and that a determination be made as to the validity of their claims.

VIII. That no previous application has been made for the granting of the annexed order.

Wherefore your petitioner prays for the granting of the annexed

order directing the aforementioned claimants and all other persons making any claim to any of the various certificates of stock deposited with the Hanover National Bank and set forth in the annexed Exhibit "A," or laying any claim to the certificates of stock now in the possession of the Trustees or the proceeds of said certificates of stock, to file their claims to the said stock with the Honorable Stanley W. Dexter, Referee in Bankruptcy, on or before the 8th day of April, 1905, and an order forever barring any claimants not so appearing or instituting proceedings in reference to said stock before the 8th day of April, 1905, from making any claim to any of the said stock, and an order referring the determination of the ownership of the said stock and surplus moneys to the Honorable Stanley W. Dexter, and directing him to proceed on or after the 8th day of April, 1905, to take testimony as to the rights, titles, interests and equities of the various claimants who so appear, and directing the said Referee to determine such rights, titles, interests, claims and equities of all the said parties who file their claims, and for such other and further relief as may be just and proper in the premises, and an order directing that the expenses, charges and costs and fees of this proceeding to determine the rights, titles, interests and equities in and to the said proceeds or the said stock be chargeable against the said stock and the proceeds thereof.

EDWARD S. THOMAS,
Petitioner.

EXHIBIT "A."

Certificates of Stock Pledged to The Hanover National Bank, by Jacob Berry & Co.

Cert. No.	No. of Shares.	Company.
2179	100	Hocking Coal & Iron,
1747	100	"
64640	2	New York, N. H. & Hartford R. R.,
F48369	16	United States Steel Corporation
15546	50	" Pr.
30563	33	" "
47114	10	" C.
A2155	50	Chicago Union Traction
1995	50	"
A3219	100	American Malting Co.
1933	20	"
1887	20	"
1891	10	"
A325	50	" Pr.
A3433	10	" "
3434	10	" "
3471	10	" "
3473	10	" "
80769	4	U. S. Steel Corporation,
91391	10	" "
36205	30	" "
82158	20	" "
56537	10	" "
A23496	40	American Foundries,
A4749	10	Canadian Pacific

21

Cert. No.	No. of Shares.	Company.
A6875	10	American Smelting
A7099	10	Colorado Southern
7053	10	" "
7148	10	" "
A3915	30	Southern Railway
3836	20	" "
1443	5	" "
B22911	10	Wabash, Pr.
B2375	10	" "
99640	10	Atchison, Pr.
99669	10	" "
J1137	40	Chesapeake & Ohio
B72508	40	Canadian Pacific
E11591	20	U. S. Leather
A1361	10	Railway Steel Springs
95716	1M	U. S. Steel Corporation 15%
95717	1M	" " " "
103080	1M	" " " "
158958	1M	" " " "
C15735	20	U. S. Steel Corporation, Pr.
15712	10	" " " "
88726	3	" " " "
B1532	20	Erie R. R.
A14899	10	Brooklyn Rapid Transit
A14899	10	Brooklyn Rapid Transit
A2332	20	Hocking Coal & Iron
2083	10	" "
2033	10	" "
2252	10	" "
1794	10	" "
48771	10	American Copper, Pr.
57579	10	" " "
57599	10	American Copper, Pr.
H7220	10	Virginia Chemical
A2229	50	Chicago & Alton
A2264	80	Cincinnati, Indianapolis & St. Louis
2845	10	U. S. Paper Bag, Pr.

22 CITY AND COUNTY OF NEW YORK, *ss:*

—— ——, being duly sworn, says that he is —— —— the petitioner in this action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

EDWARD S. THOMAS.

Sworn to before me this 16th day of March, 1905.

M. J. SHOOLBRED,
Notary Public.

(Endorsed:)—Order to Show Cause.—Filed March 21, 1905.—March 21, 1905, Referred to Referee as Special Commissioner for examination, testimony and report.—G. C. H.

United States District Court, Southern District of New York.

In the Matter of JACOB BERRY and HAROLD L. BENNETT, Individually and as Member of the firm of Jacob Berry & Company, Bankrupts.

An order to show cause having been made by the Honorable George C. Holt, on the 16th day of March, 1905, why all
23 persons who assert any claims in the reference to the ownership or title to certain certificates of stock pledged to the Hanover National Bank by Jacob Berry & Company, or the proceeds thereof, should not file their claims to any such certificates with the Referee in charge of this proceeding, or forever have their rights foreclosed upon the petition of Edward S. Thomas, and said order to show cause having come on for a hearing on the 20th day of March, 1905, now, upon reading and filing the order of George C. Holt, made on the 16th day of March, 1905, and the annexed petition of Edward S. Thomas, verified the 16th day of March, 1905, and upon the order of adjudication entered herein, and upon all the other papers and proceedings had herein, and after hearing James A. Rosenberg of counsel for Edward S. Thomas, Lloyd M. Howell, and Ashbel P. Fitch, Jr., Trustees in Bankruptcy of Jacob Berry & Company; Kurzman & Frankenheimer, attorneys for R. L. Treiss; Simpson, Thacher & Bartlett, attorneys for Anna D. Taggart; Albert W. Putman, attorney for George E. Hall; Smith, Conway & Weed, attorneys for J. N. Davies, and Samuel Betterman, attorney for N. C. Bowers, and after reading the admission of the service of the petition and order to show cause of J. Washington Logue, attorney for W. D. Allen, and upon motion of James, Schell & Elkus, attorneys for the trustees herein, it is

Ordered that R. L. Treiss, N. C. Bowers, W. D. Allen, Anna D. Taggart, George E. Hall, J. M. Davies, and all other persons making any claim to any of the certificates of stock now in the hands of the Trustees in Bankruptcy, or any certificates of stock mentioned in the exhibit annexed to the said order, and which were pledged to the Hanover National Bank by Jacob Berry & Company, or to the proceeds of the said certificates of stock, be and the same are
24 hereby directed to file their claims to the said stock in the office of the Honorable Stanley W. Dexter, Referee in Bankruptcy, No. 71 Broadway, in the City of New York, on or before the 18th day of April, 1905; and it is further

Ordered that any and all the claimants to the said stock pledged to the Hanover National Bank who shall not file notice of claim to the said stock asserting their rights or title thereto, on or before the 18th day of April, 1905, with the said Referee, Stanley W. Dexter, or who do not institute proceedings in reference to the said stock, or the proceeds thereof, before that time, be and the same are hereby forever barred from making claim or asserting any title of ownership

to any of the stock, or the proceeds thereof, that may thereafter be distributed to such claimants as this Court may direct.

Ordered that the determination of all the rights, titles, and interests, if any, in and to any and all of the said certificates of stock, or the proceeds thereof, be and the same is hereby referred to the Honorable Stanley W. Dexter, to hear and determine the rights of all such claimants, including the Trustees in Bankruptcy herein, and the said Referee, is directed in all respects, to adjust, determine and adjudicate the rights, titles, interests, equities, claims, and liens, in and to any of the certificates of stock, or the surplus thereof, pledged to the Hanover National Bank, and to report to this Court his determination thereon; and it is further

Ordered that the said Referee determine the amounts, if any, which any claimants who prove ownership to stock which was not sold by the said Hanover National Bank, but was restored to the possession of the trustees herein, shall contribute to the losses sustained by those whose stock was sold by the Hanover National Bank under its rights as pledgees; and it is further

25 Ordered that the said Referee upon the 18th day of April, 1905, or thereafter, take testimony as to such rights, titles, interests, and equities, of the various claimants who have filed their claims or instituted proceedings in reference to the said certificates of stock; and it is further

Ordered that the said Referee determine whether the expenses and costs incident to this proceeding to determine the various titles, rights, and equities, to the said certificates of stock shall be chargeable to the said stock deposited with the Hanover National Bank and the proceeds thereof or to the general estate in bankruptcy or any claimant whether in whole or in part and he shall determine the amount of said costs; and it is further

Ordered that the trustees herein shall advertise a schedule of all the certificates of stock pledged by Jacob Berry & Company to the Hanover National Bank, specifying the number of said certificates and the company by which the said certificate is issued, at least twice in the "New York Times" before the 18th day of April, 1905, and the said schedule list shall be sent by mail to all the creditors whose names appear in the schedules in bankruptcy who have filed their proofs of claim herein. And said advertisement shall give notice that all claims are to be filed on or before April 18th, with the Referee. The Referee shall give notice of the hearing to all who have filed claims.

March 25, 1905.

GEO. C. HOLT, *J.*

(Endorsed:) Order of Reference.—Hanover National Bank.—Filed March 25, 1905.

26 United States District Court, Southern District of New York.

In the Matter of JACOB BERRY & COMPANY, Bankrupts.

An order having been made by the Honorable George C. Holt on the 25th day of March, 1905, referring to the Honorable Stanley W. Dexter the hearing and determination of the rights of all claimants in and to any certificates of stock or the proceeds thereof pledged to the Hanover National Bank by Jacob Berry & Co., and notice having been given pursuant to said order, on the 4th day of April, 1905, to all creditors of the bankrupt to present any claims which they might have to said certificates at the office of the Honorable Stanley W. Dexter on or before the 18th day of April, 1905, and several claims having been filed with the said Referee to the various certificates of stock so pledged and the proceeds thereof,

Now, upon the order of reference of the Honorable George C. Holt made on the 25th day of March, 1905, and upon the notice given to the various creditors on the 4th day of April, 1905, and upon the reading and filing of the various claims made to the said stock and the proceeds thereof by various creditors of Jacob Berry & Co., and upon all the other proceedings had herein, and upon
27 motion of James, Schell & Elkus, attorneys for the trustees herein, it is

Ordered that all the claimants who have filed claim or made demand to any of the stock or the proceeds thereof pledged to Hanover National Bank by Jacob Berry & Co., shall offer proof and give testimony as to their rights and claim to the said stock before the Honorable Stanley W. Dexter, as Referee, at his office, No. 71 Broadway, City of New York, on and after the 16th day of May, 1905, until such time as all parties have been heard, and all claimants who do not so appear before the said Referee and give testimony in support of their said claims to the stock or the proceeds thereof, shall be forever barred from making any claim or asserting any title of ownership to any of the said stock or proceeds thereof that may hereafter be distributed; and it is further

Ordered that notice of the hearing upon the claims filed to the stock pledged to the Hanover National Bank, shall be given to claimants by mailing said notice ten (10) days before the hearing.

Dated May 4, 1905.

SAMUEL W. DEXTER, *Referee.*

(Endorsed:) Order for Notice of Hearing.—Hanover National Bank.

28 United States District Court, Southern District of New York.

In the Matter of JACOB BERRY & COMPANY, Bankrupts. In Bankruptcy. No. 7604.

Report of Stanley W. Dexter, Special Master.

In the Matter of Claims to Surplus Arising from the Loan by the Hanover National Bank of the City of New York.

To the Hon. George C. Holt, United States District Judge:

I, Stanley W. Dexter, Referee in Bankruptcy, to whom it was among other things referred as Special Master, by an order made and entered herein on the 25th day of March, 1905, to adjust, determine and adjudicate the rights, titles, interests, equities, claims and liens in and to any of the certificates of stock or the surplus thereof, pledged to the Hanover National Bank, and to report to the Court my determination thereof, do hereby report that pursuant to said order, I caused to be advertised a schedule of all the certificates of stock pledged by Jacob Berry & Co. to the Hanover National Bank, specifying the numbers of said certificates and the companies by which said certificates were issued, at least twice in the *New York Times* before the 18th day of April, 1905, as appears by the affidavit of Irving Rosenbaum, hereto annexed and made a part of this report.

29 I also caused said schedule list to be sent by mail to all the creditors whose names appear in the schedules in bankruptcy and who have filed their proofs of claim herein, as appears by the affidavit of E. A. Bogart hereto annexed and made a part of this report.

A printed copy of said advertisement is attached to each of the said affidavits, from which it appears that I gave notice that all claims were to be filed with the Referee on or before April 18th, 1905, as required by the said order of March 25th, 1905.

Thereafter, and in accordance with said notice, the following persons filed claims with the Referee asserting their respective claims to said stock or the proceeds thereof: Anna D. Taggart, Henry Filson, George Donaldson, Rudolph Treiss, George E. Hall, R. J. Boynton, Charles E. Brainard, Fred Williams, John M. Davies, Edward T. Little, C. P. Storrs, R. C. Brown, W. B. Smith, Hattie A. Rockwell, Henry Wells, George W. Hiskinbury, William K. Rogers, Elizabeth Waylin, Henry A. Boyd, W. R. Williams, H. E. Elwood, E. M. Grenier, Mary H. Howard, J. J. Tobin.

Thereafter I made an order as Referee dated May 4th, 1905, giving notice of the hearing to all who had filed claims as aforesaid, to offer proof in support thereof before me on May 16, 1905. A copy of said order is hereto annexed and made a part of this report.

Thereafter a copy of said last mentioned order was mailed to all who had filed claims as aforesaid, as appears by the affidavit of Robert P. Levis hereto annexed, and made a part of this report.

On May 16th, 1906, and on sundry other dates pursuant to due adjournment, I heard the allegations and proofs offered by the Trustees in Bankruptcy and by the respective claimants as aforesaid, and the matter was duly submitted on briefs of Messrs. James, Schell
30 & Elkus, as attorneys for the Trustees, Messrs. Simpson, Thacher & Bartlett, for Anna D. Taggart, Messrs. Sweezey & Glover for Henry Fikson, Albert W. Putnam, Esq., for George E. Hall, Messrs. Kurzman & Frankenheimer for Rudolph Treiss, and Messrs. Weeds, Conway & Cotter for John M. Davies; and due deliberation having been had, I report my findings and conclusions as follows:

Jacob Berry & Company were stock brokers doing business on the Consolidated Stock Exchange of New York and other Exchanges, and having a number of branch offices in New Haven, Bridgeport, Philadelphia and other cities, in charge of local agents. On November 26th, 1904, they failed and made a general assignment for the benefit of creditors, under the State Law. Subsequently they were adjudicated bankrupt on their own petition, and three Trustees were thereafter elected, succeeding a Receiver in Bankruptcy appointed November 30th, 1904.

This proceeding was instituted by the Trustee in Bankruptcy, to determine the rights and liabilities of the Trustees and various creditors, arising out of the hypothecation by Berry & Co., on November 25th, 1905—the day before the failure—of a large number of stock certificates held by them for account of various customers—to the Hanover National Bank, as collateral for a demand loan of $45,000 made on November 25th, 1905. The value of the collateral on that day is stipulated at about $56,500. Among the securities so hypothecated, were various securities for which sundry claims have been filed herein (p. 290).

Subsequent to the assignment for the benefit of creditors, the Hanover Bank called the loan, and on the same day, November 26th, its cashier delivered all the collateral in question to its brokers for sale, but as November 26th was a Saturday, such stock as was sold
31 was for future delivery. After this, the cashier gave instructions to the bookkeeper to apply the balance to the credit of Jacob Berry & Co., amounting to $13,590.31, upon the loan of $45,000, and such an entry was accordingly made in the books. This was in accordance with a written agreement held by the bank, by which the bank retained a lien upon any balance of the deposit account of the bankrupts existing from time to time. (Exhibit B of July 20, 1905, p. 290.) The bank, experiencing some difficulty in delivering some of the certificates, notably those of Anna D. Taggart and John M. Davies (claimants herein), withdrew some of the certificates, although already sold, and made other arrangements to carry out such portions of the sale made November 26th, and kept in its possession some of such certificates. Subsequently the bank returned to the Trustee in Bankruptcy, all funds and stocks over and above its loan of $45,000, viz.:

In cash, $6,310.41;

2 shares New York, New Haven & Hartford R. R. Co., Certificate No. 64,640;

50 shares United States Steel Corporation, preferred, Certificate C15,546;

33 shares United States Steel Corporation, preferred, Certificate No. A30,563;

50 shares Chicago & Alton R. R. Co., Certificate No. A2,229;

80 shares Chicago Indianapolis & Louisville R. R. Co., Certificate No. A2,264;

10 shares Union Bag & Paper Co., preferred, Certificate No. A2,845;

10 shares United States Steel Corporation, Common, Certificate No. A47,114;

30 shares United States Steel Corporation common stock Certificate No. 36,205, was delivered by the Hanover Bank for transfer, to the United *United* States Steel Corporation. Said Corporation
32 refused to transfer the certificate, and the said certificate now remains in the possession of the United States Steel Corporation, to which said corporation lays no claim, but holds, to be delivered either to the claimant, John M. Davies, or to the Trustees in bankruptcy, as the Court may decide in this proceeding; and it is agreed that this certificate shall be regarded, as far as this proceeding is concerned, as if the said certificate was in the possession of the Trustees in Bankruptcy.

The only claimants who appeared to offer proof with reference to their claims before the Special Master, are

1. The Trustees in Bankruptcy.
2. Edward T. Little.
3. Harris Filson.
4. George E. Donaldson.
5. George E. Hall.
6. Anna D. Taggart.
7. W. C. Bowers.
8. Malcolm M. Butler.
9. W. D. Allen.
10. Rudolph Treiss.
11. J. M. Davies.

As to all other claimants who have failed to appear and offer proof, their default should be noted, and under the terms of the order dated March 25th, 1905, they are forever barred from making claim or asserting any title of ownership to any of the stock, or the proceeds thereof, that may hereafter be distributed as this Court may direct.

The following is a schedule of the certificates of stock which have been claimed by the claimants in this proceeding, as above enumerated, which certificates were sold by the Hanover National Bank as aforesaid, together with the prices realized by said bank on said securities respectively:

33	3 shares U. S. Steel Corporation, preferred Certificate No. 88,726	$283.87
	20 shares Atcheson preferred, Certificate Numbers 99,640 and 99,669	2,072.50
	200 shares Hocking Coal & Iron, Certificates Numbered 2,179 and 1,747	3,087.50
	16 shares U. S. Steel Corporation Certificate No. F48,369	472.
	10 shares Railway Steel Springs, Certificate No. A1,361	327.50
		$6,243.37

The value of the stock certificates now in the possession of the Trustees, as of November 26, 1904, is as follows:

2 shares New York, New Haven & Hartford R. R. Company	389.75
83 shares U. S. Steel Corporation, preferred	7,874.62
10 shares U. S. Steel Corporation, common	295.
30 shares U. S. Steel Corporation, common	885.
50 shares Chicago & Alton	2,000.
80 shares Chicago Indianapolis & Louisville	6,000.
10 shares Union Bag & Paper Co., preferred	750.
	18,194.37

The value of the securities in the possession of the Trustees as of the date of the closing of the hearings in this proceeding, to wit: July 20th, 1905, is as follows:

2 shares New York New Haven & Har. R. R. Co.		402.
	83 shares U. S. Steel preferred	8,507.50
34	10 shares U. S. Steel common	345.
	30 shares U. S. Steel, common	1,035.
50 shares Chicago & Alton		1,025.
80 shares Chicago, Indianapolis & Louisville		
10 shares Union Bag & Paper Co., preferred		

Before taking up for consideration the various claims, I will state briefly the general principles which I consider applicable to the situation, and upon which I have acted.

The claimants were all customers of Jacob Berry & Co. and their respective rights and liabilities are governed by the principles of law governing the relations of broker and client.

The claims in question, as developed at the hearing, resolved themselves into three general classes.

1. One claim (that of Edward T. Little) is the ordinary case of purchase of stock on a cash margin, the brokers themselves advancing the balance of the purchase price, and holding the stock so purchased as collateral for such advances.

2. Five claims (those of Filson, Donaldson, Hall, Taggart and Bowers) are cases of the deposit of the customers' securities in lieu of cash margin, for similar stock transactions.

3. Four claims (those of Butler, Allen, Triess and Davies) are cases of delivery of securities to Berry & Co. to be sold outright for customers' account and not for speculative trading.

4. In addition to these, the trustees urge a claim for $7,279.90 being the difference between the deposit account of Berry & Co. in the Hanover Bank on November 26th, 1904, and the balance paid over to the trustees in bankruptcy by the said bank, and
35 which the trustees ask should be made a charge on the securities claimed by customers in this proceeding.

It is, I think, now the established law of the State of New York, where these transactions were made or performed, and which must govern the relations and rights of the parties (*In re* Swift, 105 Fed. 493, affirmed *sub nom.* Hutchinson *vs.* Dee, 112 Fed. 315 (C. C. A.) that the relation of stock broker and client under the ordinary contract for a speculative purchase of stock, is that of pledger and pledgee. Considerable discussion has arisen in the cases as to the precise relation, and much divergence of opinion prevails in the reported decisions, but the principle seems now well established in this State, and generally by the weight of authority in the United States (with the notable exception of Massachusetts, *In re* Swift, 105 Fed. Rep. 493).

Dos Passos on Stock Brokers, p. 193 (and cases cited in note).

In New York, the leading case establishing this principle is Markham *vs.* Jandon, 41 N. Y. 235, and although there was a vigorous dissent by two judges, and a partial overruling on the question of the measure of damage by the later case of Baker *vs.* Drake, 53 N. Y., 211, I cannot find that the remaining doctrines enunciated in Markham *vs.* Jandon have ever been questioned in this State. On the contrary, it has been repeatedly cited and approved as the leading authority governing the *the* relations of broker and client.

Stenton *vs.* Jerome, 54 N. Y. 480,
Baker *vs.* Drake (2nd appeal), 66 N. Y. 518,
Le Marchant *vs.* Moore, 150 N. Y., 209,
Gruman *vs.* Smith, 81 N. Y. 25,
Gillett *vs.* Whiting, 120 N. Y., 402,
36 Rothschild *vs.* Allen, 90 App. Div., 233,
Rogers *vs.* Wiley, 131 N. Y., 527,
Douglas *vs.* Carpenter, 17 App. Div., 329.

It is true that the United States Supreme Court has held that, with relation to the provisions of the Bankruptcy Acts, which limit the operation of a discharge, a claim based on fraudulent conversion by a broker is not a debt created by the fraud of the bankrupt while acting in any fiduciary capacity.

Crawford *vs.* Burke, 195 U. S. 176,
Hennequin *vs.* Clews, 111 U. S., 676.

But all that is there decided is that the words "fiduciary capacity" are strictly limited to the relation of an express trust in the purview

of the discharge features of the Bankruptcy Act, and does not include factors, brokers or agents.

Chapman *vs.* Forsyth, 2 How. (U. S.) 202-208.

It may be conceded that the contract of bailment does not create a technical trust, but that question is immaterial here. All that is involved here is a question of the rights of the parties as between themselves and must be decided according to the contracts that the parties themselves have made and the rules of law applicable thereto.

Conceding, therefore, that the relations of Berry & Co. to the claimants herein were those of pledgee, it follows that the right to retain the pledge ceased the instant lien was discharged by the tender or payment of the debt, and the right of the claimant to his property then became absolute.

Lawrence *vs.* Maxwell, 53 N. Y. 19.

A further general principle may be gathered from the au-
37 thorities. The rule is well stated by Bosworth (a distinguished judge, then retired and acting as Referee):

"As to stock bought for a customer, and which can be identified in the hands of any pledgee of the firm, who has sold it, such customer may, as I am at present advised, elect to ratify such sale, if he has done nothing inconsistent with his right to make such election, and claim the price at which it was sold. If the proceeds of stock thus identified have come to the receiver's hands, the customer may follow them. If the stock has come to the receiver's hands, unincumbered by the pledge, and he still has it, the customer may reach it, and have a delivery of it, by paying to the receiver the amount owing to the firm in respect to it."

Chamberlain *vs.* Greenleaf, 4 Abb. N. C., 178.

The pivoted question upon which the rights of the parties depend is that of the ownership of the stock in question,

Le Marchant *vs.* Moore, 150 N. Y., 209, 215,

and the general and well recognized rule is that a principal is entitled in all cases when he can trace his property, to reclaim it, and it is immaterial whether it may have been converted into money, provided only that it is in a condition to be distinguished from the other property or assets of the agent.

Roca *vs.* Byrne, 145 N. Y., 182, 186.

It may also be stated as a general rule, that a stock broker may by custom, lawfully re-hypothecate his customers' securities, separately, for an amount not exceeding the indebtedness due on
38 them, although he cannot, without his customer's express consent, mingle them with other securities and pledge them for an amount exceeding his customer's indebtedness.

Douglas *vs.* Carpenter, 17 App. Div., 329, 333 and cases cited at p. 331.

Chapman *vs.* Brooks, 31 N. Y., 75.

McNeil *vs.* Tenth National Bank, 46 N. Y., 325.

If the broker does rehypothecate a customer's securities without his knowledge and consent, mingling them with securities of his own and those of other customers, and the pledgee sells them, in whole or in part, to liquidate the loan on them, the owners of the securities become co-sureties to the extent of the burden laid on their respective securities, and may look to any surplus obtained on the sale of the collateral in the proportion in which they have respectively suffered, to the extent of the broker's indebtedness to them respectively.

Chamberlain *vs.* Greenleaf, 4 Abb. N. C., 185.
Gould *vs.* Central Trust Co., 6 Abb. N. C., 381.
Whitlock *vs.* Seaboard Bank, 29 Misc. 84.

The stocks so pledged in such case, which belong to the broker, must be first applied in full pay to the loan.

Farwell *vs.* Importers & Traders Bank, 90 N. Y., 483.

The surplus securities (if any) should be sold, as impressed with a trust for contribution and distribution made among the customers whose securities were pledged upon the ratio of the loss of each.

Whitlock *vs.* Seaboard Bank *(supra)*.

In the cases cited, the customers had no knowledge and
39 gave no consent to the rehypothecation. In the present proceeding, such consent is claimed to have been given in some instances by the *the* acceptance of a printed receipt, under varying circumstances—which will be subsequently discussed. But it is not claimed that any one of the customers had any actual knowledge of the use to which their securities were put.

Having stated the principles generally applicable to this proceeding, I will now consider the individual claims as presented by the proofs.

Claim of Trustees in Bankruptcy.

The Trustees claim that when the Hanover National Bank on November 26th, 1904, applied the whole of the deposit account of Berry & Co. upon the $45,000 loan, the loan had been paid by sale of the collateral, and that it did so without warrant or legal right, and that, therefore, the difference between the deposit account of $13,590.31 and the cash actually refunded by the bank, $6,310.41, being the sum of $7,279.90, should be declared a lien upon the certificates of stock claimed by the customers herein, so as to restore the deposit account to its full amount.

For this novel proposition no authority is given, nor can it be sustained upon any tenable theory. The bank had by contract, a lien upon the deposit account of Berry & Co., as security for any indebtedness. Even if there had been no express contract, it could have offset the bank balance against the firm's liability on the note, under Section 68 of the Bankruptcy Act.

New York County National Bank *vs.* Massey, 192 U. S., 138.

But it is claimed that the bank had already sold sufficient of the securities to liquidate the loan and leave a cash surplus, so that the application of the deposit balance was unnecessary. I
40 do not find this to be the fact, but even if so, it is immaterial, as the Court is authorized to marshal the assets in accordance with equitable principles. The Bank could not by any action on its part, prevent the proper readjustment of the various equities by the Court. On all equitable principles, however, the bank acted entirely right. The claimants herein had the right to compel the application of the Berry assets to the payment of the Hanover Bank loan before resort should be had to their securities and those of innocent parties.

Smith *vs.* Savin, 141 N. Y., 315, 325.
Farwell *vs.* Bank, 90 N. Y., 483, 491.
Gould *vs.* Trust Co., 6 Abb. N. C., 381.
Le Marchant *vs.* Moore, 150 N. Y., 209.
Union Pacific Ry. *vs.* Schiff, 78 Fed. Rep., 216, affirmed 86 Fed. Rep., 1023.

Therefore, in considering the claims of the various customers, it becomes unnecessary to discuss the question of contribution for losses, as between themselves, for the reason that after applying the deposit account of Berry & Co. on the loan and all securities to which no claim is made herein, and which, therefore, must be presumed to be the property of Berry & Co. the surplus of cash and securities in the possession of the trustees is amply sufficient to meet all claims proved in this proceeding.

Claim of Edward T. L. Little.

Little ordered Berry & Co. on November 17, 1904, to buy for his account 10 shares Railway Steel Spring stock, which order was reported to him as executed on the same day, and his account charged with the purchase price, $317.50. The stock was never delivered to Little, nor was it transferred to his name. He never saw the certificate, and did not know the number thereof. His sole
41 knowledge was derived from the published notice, stating that three certificates of ten each of this stock were included in the loans to Berry & Co. by the Hanover and Consolidated National Banks (p. 44). It is conceded that the books of the bankrupts show that they were indebted to this claimant in the sum of $396.04 on the day before the failure (p. 62).

I am constrained to find that the claimant has not sufficiently identified the certificate for ten shares sold by the Hanover Bank, as his property. This is absolutely essential to enable him to follow the stock into the pledgee's hands.

When the firm has so mingled the stock bought for customers with others, that no identification is possible, a claimant cannot insist that a particular certificate belongs to him merely from the fact that the firm had in its possession one or more certificates for the same number of shares.

Chamberlain *vs.* Greenleaf, 4 Abb. N. C. 178.
Sillcocks *vs.* Gallaudet, 66 Hun., 522.

But a further reason appears for the dismissal of this claim. The claimant, with full knowledge of the condition of his account, filed a claim as a general creditor herein on December 19th, 1904, for $720, "money deposited by deponent with said bankrupts," and participated in the very hotly contested election of trustees. This constituted an election to treat the conversion of his stock as a sale, and its value on November 26th, 1904, was therein included. He cannot now revoke this election to the detriment of the other creditors over whom he obtained a greater voice in the election of trustees than he would have been entitled to on his present contention.

Le Marchant *vs.* Moore, 150 N. Y., 209, 218.
In re Schlessel (by Thomas, *J.*, July 31, 1904, unreported).
42 *In re* Bloss, Fed. Cases, 1562.
Loveland on Bankruptcy, 2nd Ed. 338.
New Bedford Insurance *vs.* Bank, 9 Allen, 175, 180.

The claim of Edward T. Little should be dismissed.

Claim of Harris Filson.

Filson claims a lien on the fund as the owner of two certificates for ten shares each of preferred stock of the Atchison, Topeka & Santa Fé Railroad Co., which were pledged with the Hanover Bank with other collateral, and sold by the bank in liquidation of its loan.

The claimant identified the certificates by their respective numbers, and produced Berry & Company's receipts therefor, dated November 25th, 1904. It is admitted that the bankrupts immediately hypothecated them with the Hanover Bank, and that they were sold by that bank, realizing the sum of $2,072.50, which the claimant seeks to recover herein.

Filson had a speculative account with Berry & Co., and was "trading on both sides of the market." On the morning of November 25th, his account showed that he had bought on margin 70 shares of stock, including 40 half shares of Pennsylvania R. R. and that he had sold "short" 50 shares of stock, including 20 shares of "Atchison preferred" and 10 shares of "Erie, first preferred." The account also showed a cash credit of $3,105.97. The claimant testified that he called at the office of Berry & Co. on the morning of November 25th to arrange to take out of the account the 40 half shares of Pennsylvania, which he had previously bought on margin
43 on November 17th. He took with him one of the ten share certificates of Atchison in question, and asked the cashier to figure up the account and let him know if the deposit of the Atchison certificate would leave sufficient margin to withdraw the Pennsylvania stock. He was informed that it was insufficient, as the withdrawal would leave a credit balance of only $300-$400. Filson then went to his safe deposit box and took out two additional certificates for 10 shares of Atchison and 10 shares of Erie, respectively, and delivered them, together with the other certificate to Berry & Co. on their usual receipt, which recited that Berry &

Co. might hold the same as margin, and might rehypothecate all stocks purchased for his account and held on account thereof as margin or otherwise and substitute similar securities, and might sell without notice upon the approximate exhaustion of margins (Set out in full at p. 18). The next day Berry & Co. failed. Filson never received his Pennsylvania stock, and it is conceded (p. 13) that on November 26th no certificate of Pennsylvania stock came into the hands of the Receiver in Bankruptcy, nor was deposited in any bank as collateral.

The trustees contend that the transaction was either a purchase of Pennsylvania stock for Atchison stock, and this created a mere relation of debtor and creditor—or it was a deposit as collateral security for the marginal account, with unlimited powers of disposition and substitution, inconsistent with a continued claim of title thereto.

They also call attention to the fact that Filson was "short" the identical number of Atchison and Erie shares, and that the delivery of these certificates on November 25th was apparently to cover or complete such "short" sales. There is no evidence that such was the case, and the claimant's testimony is uncontradicted as to the purpose of the deposit (p. 15).

44 By a prior order in this proceeding, Filson has recovered from the trustees the ten shares of Erie, certificate not hypothecated, and his petition was severed accordingly.

I cannot see any difference in principle between the two applications, apart from the question of contribution which does not arise here. Filson has clearly identified his stock. The bankrupts have no lien or claim thereon, failed to deliver the Pennsylvania stock as required by the conditions of the deposit, kept one certificate in their safe and hypothecated the others. Under the terms of the receipt if unqualified by the contemporaneous oral agreement, while Berry & Co. might be acquitted of conversion, nevertheless, their title was not absolute, nor did they have unlimited power of disposition of the securities held by them. Under the authorities above cited, the legal title still remained in Filson. The terms of the receipt gave Berry & Co., in my opinion, no greater powers of disposition than they already possessed by law and custom, except in one particular, namely, they were permitted to sell the pledged securities without notice, but only after the "approximate exhaustion of margins." In other words they were permitted in case of a default on the part of the customer, to avail themselves of such default without notice, and sell accordingly. Nothing in the receipt implies that the customer should part with title to his securities.

It is, therefore, immaterial whether Filson deposited his stock for a special purpose, as he testifies, or on his general account. In either case he has the right to follow his securities into a pledgee's hands, and if they have been sold, to follow their proceeds. The only difference in the effect of an unauthorized hypothecation and one that is consented to by the customer, appears in the respective claims to contribution. If a customer's securities are pledged with-

45 out right and without his consent, he can *can* recover them without contribution for losses incurred by others whose securities were pledged rightfully.

Thompson *vs.* Morton Trust Co., 91 App. Div., 274.

Where the claimants are of the same class, manifestly they must share pro rata in the fund.

Rhinelander *vs.* National City Bank, 36 App. Div., 11.

And where, as in this case, the surplus is sufficient to answer to each claim in full, no necessity for these distinctions arise-.

I find that Harris Filson is entitled to a lien on the fund in question to the extent of $2,072.50.

Claim of Anna D. Taggart.

Mrs. Taggart claims to recover from the trustees two certificates for 83 shares United States Steel Corporation, returned by the Hanover Bank unsold.

There is no doubt as to the identity of these certificates. They are registered in the name of Anna D. Taggart, and are identified by number as well.

It is unnecessary, in view of the preceding discussion, to determine whether Mrs. Taggart deposited these certificates as a special account, or whether she intended them to be used as margin for her speculative account. The receipt given by the Philadelphia manager of Berry & Co. contained the special provision as to rehypothecation, etc., above adverted to, and it was shown that Mrs. Taggart conducted a very active series of sales and purchases of stock—without further margin. The account was first opened in January, 1903, and continued down to the failure of Berry & Co.

On November 25th, the firm rehypothecated the 83 shares belonging to Mrs. Taggart, with other securities to the Han-
46 over Bank for a loan of $45,000, and after the liquidation of the loan these securities were turned over to the trustees unsold, and form part of the surplus involved in this proceeding. The trustees assert no claim or lien to the stock, and in spite of Mrs. Taggart's touching self depreciation as to her knowledge of financial matters, she appears to have been fairly successful in the stock market, for her account shows that Berry & Co. were indebted to her, on a final settlement as of November 26th, in the sum of $841.03, besides her original deposit of stock.

From what has previously been said, it is apparent that Anna D. Taggart has established her right to recover from the trustees the certificates claimed, to wit, certificate No. C15,546, for 50 shares, and certificate A30,563, for 33 shares of the preferred stock of the United States Steel Corporation, and I so find.

Claim of William C. Bowers.

Bowers claims to recover from the trustees a certificate for two shares of stock of the New York, New Haven & Hartford Railroad Co. returned by the Hanover Bank unsold.

The stock stands in the name of W. C. Bowers, and is thus fully identified, as well as by the certificate number 64,640 in the receipt given by the manager of the Bridgeport office of Berry & Co.

It appears from the claimant's testimony that in October, 1904, he ordered the Bridgeport manager of Berry & Co. to buy for him 50 shares of New York, Ontario & Western stock. The order was reported as executed, and on October 27th the claimant deposited as margin $150 in cash and a certificate for two shares New York, New Haven & Hartford stock in question on the usual Berry receipt above referred to. Bowers never received the Ontario stock. The
47 certificate in question was on November 25th, 1904, hypothecated by Berry & Co. with the Hanover Bank, with other securities for a loan of $45,000, and after liquidation of the loan, returned by the bank to the trustees as part of the surplus fund in this proceeding.

No claim or lien is asserted by the trustees, and Bowers was not indebted to Berry & Company on the closing of the account on November 26th, 1904.

For the reasons above assigned, I find that William C. Bowers is entitled to recover from the trustees herein certificate No. 64,640 for two shares of stock of the New York, New Haven and Hartford Railroad Company, identified as his property.

Claim of George Donaldson.

Donaldson claims a lien on the fund of $283.87, the proceeds of three shares of preferred stock of the United States Steel Corporation belonging to him and rehypothecated by the bankrupts and sold by the Hanover Bank.

The claimant was the owner of certificate No. C88,726 for three shares United States Steel Corporation preferred stock, and on October 31, 1904, through his agent Morrow, deposited it with Berry & Co. as margin for a speculative account then opened. It is conceded that Berry & Co. hypothecated this certificate with other securities to the Hanover Bank for a loan of $45,000, and that it was sold by the bank on or about November 26th for $283.87.

No claim or lien upon this stock is asserted by the trustees, and Donaldson was not indebted to Berry & Co. on November 25th, 1904.

Under these circumstances I find that George Donaldson has a lien on the fund in question in the sum of $283.87.

48 *Claim of George E. Hall.*

Hall seeks to recover certificate for ten shares of common stock of the U. S. Steel Corporation, returned to the trustees by the Hanover Bank, unsold.

On November 1st, 1904, Hall deposited certain securities including certificate No. A47,114 for 10 shares U. S. Steel stock with the New Haven manager of Berry & Co., and took a receipt specifying merely that the securities were "held as collateral." Berry & Co. hypothecated them with the Hanover Bank. Hall had a speculative account

with Berry & Co. at the time, and the securities were deposited in lieu of cash margin for the account. By a prior order in this proceeding, the claimant has recovered from the trustees certain stocks found to be his property, but which had not been hypothecated by Berry & Co.

No lien or claim on the stock in question is asserted by the trustees, and Hall was not indebted to Berry & Co. on November 25th, 1904. He is, therefore, entitled to recover his stock unless by his own actions he has waived his right of reclamation.

Hall filed a claim in bankruptcy on December 19, 1904, for $1,850, which included the value of all his stocks in the hands of Berry & Co. value- at $1,600, and a cash balance of $250 due him; and participated actively at the meetings held for the election of a trustee. This would constitute an election of remedies, and bar the claimant from prosecuting the present claim, were it not for the fact that the proof of claim fully sets forth the facts relative thereto, and contains the following reservation:

"Said deponent hereby stipulates that by filing notice of
49 this claim he does not waive any right of action that he now has to recover possession of said certificates or the value thereof against either of the bankrupts or any person in whose possession they may be found, or any right of action that he has against either or both of said bankrupts for the conversion of said certificates to their own use when said bankrupts knew that said certificates were not their property, and never had been; and that the said deponent does not waive any right whatsoever of any kind, nature or description against said bankrupts, or either of them, for or on account of the failure of the bankrupts or either of them to return said certificates to said deponent, and for the unlawful hypothecation and conversion of the same by said bankrupts, or either of them."

I am of the opinion that such a reservation, with a full disclosure of facts, negatives the idea of an election of remedies on the part of the claimant. Election implies intent, and the claimant gave notice to all concerned that he had no intention of abandoning his right to follow his stock if he could do so. It was, therefore, incumbent on the creditors and parties interested, to promptly object to the allowance of the claim for the purpose of voting, and it would then have been the duty of the Referee to require an absolute election of remedies, or the expunging or reduction of the claim.

I, therefore, find that George E. Hall is entitled to recover from the trustees certificate No. A47,114 for ten shares United States Steel Corporation belonging to him, but before receiving the certificate, the said Hall must file with the Referee an amended claim reducing the amount claimed by him by the value of the securities recovered.

50 *Claim of Malcolm N. Butler.*

Butler claims to recover from the trustees a certificate for ten shares of preferred stock of the Union Bag & Paper Co. returned by the Hanover Bank unsold.

Butler had a speculative account with Berry & Co. and sufficient margin to keep the account good. He identified a certain certificate No. A2,845 for ten shares preferred stock of the Union Bag and Paper Co. as his property,—it being registered in his name. He testified that in August, 1904, he deposited the certificate in question with Berry & Co. for safe keeping, with instructions that it should not be transferred, and that the firm's bookkeeper assented to this request. Nevertheless, he executed a blank power of attorney to sell and transfer, and took no receipt for the stock. The firm hypothecated the stock, with other securities with the Hanover Bank on November 25th, 1904, for a loan of $45,000, and it was returned by the bank to the trustees, after the liquidation of the loan, unsold, and is part of the surplus fund in this proceeding.

The trustees assert no claim or lien to the stock in question, except as hereinafter mentioned,—and Butler was not indebted to Berry & Co. on the closing of the account as of November 26th, 1904.

Except for the action of Butler in filing a claim for the entire amount of Berry & Company's indebtedness, I should find that he had proved title to the stock.

On December 19, 1904, the claimant, however, with full knowledge of the facts, but with a mistaken view of the law, filed his claim herein for $1,679.15, which included the value of the ten shares of stock in question, and participated in the election of creditors held on that day, in which an abortive attempt was made to elect a
51 trustee. He took no further part in the subsequent proceedings, however, in which the trustees were actually elected, until April 24th, 1905, when he filed his petition herein for the return of the stock in the trustees' possession. After the hearings were closed in this proceeding, he for the first time, moved for leave to amend his claim by striking out the value of the stock here demanded.

I am of the opinion that the claimant made a valid election of remedies when he filed his claim for the value of the stock on December 19th, 1904, and that — is precluded by his own laches from seeking to change his position at this time.

I find that the claim of Macolm N. Butler should be dismissed.

Claim of W. D. Allen.

Allen claims a lien on the funds in the hands of the trustees for the sum of $472, proceeds of the 16 shares of U. S. Steel common stock sold by the Hanover Bank.

The stock represented by certificate No. F48,369 stood in the name of W. D. Allen, and is fully identified as his property. Allen had a marginal account with Berry & Co. for which this certificate was held as collateral, but the account had been closed prior to November 25th, 1904, and the certificate in question was left with Berry & Co. for safekeeping and subsequent sale. Berry & Co. hypothecated this certificate, with other securities, with the Hanover Bank for a loan of $45,000 on November 25th, and on November 26th the bank sold the certificate in question for $472 in part liquidation of its loan.

Under these circumstances it is clear that this claimant is entitled to follow his stock or its proceeds, and I find that he is entitled to a lien on the fund in the hands of the trustees for the sale price, $472.

52 *Claim of Rudolph Triess.*

Triess claims a lien on the fund in the hands of the trustees for the sum of $3,087.50, proceeds of 200 shares of Columbus & Hocking Coal & Iron Co. stock sold by the Hanover Bank.

On November 14, 1904, the claimant deposited with Berry & Co. three certificates for 100 shares each of common stock of the Columbus & Hocking Coal & Iron Co., Nos. 1,747, 2,178 and 2,179, and took the firm's plain receipt therefor. The instructions to the brokers were to keep them and sell them at twenty-five. Berry & Co. never returned the stock, nor made any payment to claimant, but instead hypothecated two of said certificates, Nos. 2,179 and 1,747, for 100 shares each, on November 25th, 1904, to the Hanover Bank with other securities, for a loan of $45,000. The Hanover Bank sold these certificates in partial liquidation of the loan, for the sum of $3,087.50, and returned a surplus of stock unsold, and $6,310.41 in cash to the trustees.

The claimant had no speculative account with Berry & Co., and the trustees have no claim or lien upon the stock in question.

The hypothecation by Berry & Co. was entirely unauthorized, and the claimant is entitled to a lien on the fund in the hands of the trustees for $3,087.50, the proceeds of the sale aforesaid.

Claim of John M. Davies.

Davies claims to recover from the trustees a certificate for 30 shares of common stock of the U. S. Steel Corporation, No. 36,205, now in their possession. The facts as stipulated (pp. 280-286) are as follows:

On November 18th, 1904, Davies being the owner of 30 shares of common stock of the U. S. Steel Corporation represented by
53 certificate No. 36,205, delivered it to Berry & Company's duly authorized agent at Plattsburgh, N. Y., to be sold by Berry & Co. at $28 a share, or better,—the proceeds to be paid to claimant less the usual commissions. He took a plain receipt for the same from the agent. At that time he was not indebted to Berry & Co. and had no account or other transactions with them, and the certificate was delivered to Berry & Co. for sale only. The certificate No. 36,205 was forwarded by the agent to Berry & Co. at New York City, but did not reach them there until November 21st. Before its arrival, however, Berry & Co. sold 30 shares of U. S. Steel common stock at $28 per share to one Terhune, a broker, intending said sale as a fulfillment of Davies' order,—delivery to be made through the New York Clearing House on the following day. As certificate No. 36,205 did not reach New York on that day, another thirty shares,—the property of Berry & Co.—were included on the Clearing House

sheet of November 22nd in the place thereof. Berry & Co. immediately notified Davies that the certificate had been sold at $28 per share, and that a remittance for the full amount, less commissions, he would be sent directly from the New York office. After frequent demands by claimant upon the Plattsburgh agent, claimant received on November 25th, 1904, after banking hours on that day a check for $836.25, dated November 23rd, 1904, drawn by Berry & Co. on the Hanover National Bank, New York, payable to the order of claimant. The claimant endorsed and deposited the check in the Plattsburgh National Bank on the morning of November 26th, 1904, knowing nothing of the financial responsibility and standing or credit of Berry & Co., but believing that their credit was good. After the deposit of the check, and later in the same day claimant first learned that Berry & Co. had failed. He immediately tele-
54 graphed the Steel Corporation's transfer agent to stop transfer of the certificate, and transfer was accordingly stopped, and the certificate in question remains in that office subject to the final order in this proceeding (p. 293).

On November 25th, certificate No. 36,205 was among other securities pledged by Berry & Co., to the Hanover Bank as part security for a loan to them. The bank sold it at $29⅝ per share, delivery to be made later, and on November 26th pres-nted it for transfer at the office of the United States Steel Corporation. Transfer was refused, however, owing to the claimant's telegram above mentioned. On November 29th the claimant served on the bank notice of claim to said certificate, and the bank withdrew its request for transfer, and provided for the delivery of the 30 shares sold by it in some other manner. Said bank no longer asserts any interest in the said certificate No. 36,205, which is now in the constructive possession of the trustees herein.

The check mentioned was presented for payment and dishonored on November 28th, 1904, and duly protested. Proper demand was made both on the Receiver and on the trustees, with an offer in each case to return the check received. The Receiver and the trustees refused to make such delivery until so ordered by the Court. Claimant has not been paid for his stock. Berry & Co. assigned on November 26th, 1904, at 11 o'clock in the forenoon, and were adjudicated bankrupt November 30th, 1904.

The Clearing House alluded to is a method by which brokers strike a balance between their sales and purchases, so as to avoid the necessity of a delivery of all certificates bought and sold. By this method, a broker purchasing a certain amount of a particular stock, and selling a certain amount of the same stock on the
55 same day, merely delivers or receives, as the case may be, the difference between the number of shares bought or sold. This plan is adopted by all stock exchange houses, in order to obviate the trouble incident to an actual delivery,—the broker retaining for his purchasing customers the certificates which other customers had directed him to sell.

On November 22, 1904, the day after the sale for claimant's account, Berry & Co. purchased for customers more certificates of "U. S.

Steel common" than they sold certificates of the same stock for their customers.

Upon these facts it must be held that the sale of 30 shares to Terhune on the 21st day of November, 1904, was a fulfillment of claimant's order; that his title to the certificate in question was completely divested by such sale and his claim against Berry & Co. was thereby transferred to the proceeds of such sale. By employing stock brokers who deal in the New York market, Davies became bound by the rules and usages of that market, and the brokers were entitled and obliged to sell his stock in the usual and ordinary way.

Porter *vs.* Wormser, 94 N. Y., 431;
Skiff *vs.* Stodard, 63 Conn., 198;
Hunt *vs.* Bennett, 19 N. Y., 170;
Dos Passos on Stock Brokers, pp. 424, 429.

Having accepted the order, and the certificate being in their agent's possession, Berry & Co. were bound to sell when the market reached 28 under penalty of damages for any loss sustained.

Galigher *vs.* Jones, 129 U. S., 193, 201.

Inability to make delivery of any particular certificate
56 would have been no excuse, as any other certificate for the same amount would have been good delivery.

Douglas *vs.* Carpenter, 17 App. Div., 329.

Berry & Co,, therefore, after making and reporting the sale, completed the sale through the Clearing House Exchange the next day, and the effect of such settlement was to divest Davies of any title to his certificate of stock and transfer the title to the stock represented thereby to other customers of Berry & Co., who on that day were purchasers of "Steel common." For as Berry & Co. purchased more "Steel common" than they sold, it is apparent that they had to retain the certificate in question to fulfill purchasing orders by other customers, and received through the Clearing House only the necessary balance of stock.

Davies then had a valid claim against Berry & Co. for $836.25, the net amount of the sale.

There is no question here of the rights of a pledgee to follow his stock or its proceeds, as in the cases heretofore considered herein. Berry & Co. had sold the stock at claimant's orders, and were responsible only for the proceeds. Claimant's title was thus completely divested. There is no custom that payment for stock must be concurrent with the passing of title only. The custom is indeed to the contrary, as the Clearing House method of exchanges shows,—to which claimant must be deemed to have assented. This is merely a case of the acceptance of a check uncertified,—the nonpayment of which relegates the payee to his original remedy against the drawer. But that original remedy was merely a claim for the sales price of the stock, or possibly for conversion of funds by an agent. Such
a suit could not affect the title of stock, already divested by
57 sale. It would be merely for breach of contract.

No claim is made here for rescission of the sale for fraud,

and indeed, it is difficult to perceive how such a claim could in any event be made, under the circumstances herein. Berry & Co. were probably insolvent when the stock was received, but that is not of itself sufficient to rescind an actual sale. The claim of Davies is based on his continued ownership of the stoeck, because of non-payment to him, and that is without merit, as already shown.

For the foregoing reasons I find that the claim of John M. Davies for the return of the certificate in question must be dismissed.

Surplus Unclaimed.

There remains in the hands of the trustees the following securities to which no claim has been made by any creditor or other person in this proceeding.

Certificate A2,229 for 50 shares common stock of Chicago & Alton R. R. Co.

Certificate No. A2,264 for 80 shares of common stock of Chicago, Indianapolis & Louisville R. R. Co.

I find that the title to these securities, as well as to the 30 shares of common stock of the U. S. Steel Corporation represented by certificate No. 36,205, is in the Trustees in Bankruptcy herein, subject to a charge for any deficiency in the amounts directed to be paid to claimants herein, and the costs and expenses of this proce-ding.

Expenses and Costs.

Under the terms of the order of March 25th, 1905, the
58 Referee was directed to determine whether the expenses and costs incident to this proceeding shall be chargeable to the fund, or to the general estate in bankruptcy, or to any claimant, whether in whole or in part, and the amount of said costs.

As the expenses incurred by the trustees for stenographers and Commissioner's fees, I find that all of such expenses should be first paid out of the fund in the hands of the trustees, and if the same should prove insufficient to pay such expenses and the awards to successful claimants in full, then that such awards should abate proportionately.

I find that all other costs should also be chargeable to the special fund, and not to the general estate in bankruptcy, except in the cases of claimants whose claims are dismissed. As to these claimants, the taxable costs incurred in the contest of their respective claims should be chargeable to them personally.

The only costs allowable in this proceedings are those between party and party, and are regulated by the U. S. Revised Statutes §§ 824, 983, which are made applicable by General Orders in Bankruptcy XXXVIII.

In re Scott, 7 Am. B. R., 710.

They are "bills of fees of the clerk, marshal and attorney, and the amount paid printers, witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials." A docket fee of twenty dollars should be allowed in each case (§ 824). All remaining expenses should be taxed before the Judge or Clerk of the Court (§ 824), or by the Referee.

In re Scott, 7 Am. B. R., 710.

59 *Summary.*

1. I find and report that following claimants are entitled to recover from the Trustees in Bankruptcy their respective securities, viz.:

George E. Hall, certificate No. 47,114, for 10 shares common stock of U. S. Steel Corporation, with costs.

Anna D. Taggart, certificate No. 15,546, for 50 shares and certificate No. 36,563 for 33 shares of preferred stock of U. S. Steel Corporation, with costs.

W. C. Bowers, certificate No. 64,640, for two shares of stock of New York, New Haven & Hartford Railroad Co., with costs.

2. The claim of the trustees for reimbursement of the sum of $7,279.90 should be dismissed.

3. The trustees should be directed to sell forthwith at brokers' board or public auction, the following securities in their possession, the title to which is found to be in them, and add the proceeds to the balance of $6,310.41 in their hands to be distributed as herein recommended.

Certificate No. 36,205 for 30 shares of the common stock of U. S. Steel Corporation,

Certificate No. A2,229 for 50 shares of the common stock of Chicago & Alton Railroad Co.

Certificate No. A2,264 for 80 shares of the common stock of the Chicago, Indianapolis & Louisville Railroad Co.

4. The following claimants are entitled to a lien on the
60 fund in the hands of the trustees, and the trustees should be directed to pay them forthwith the sums respectively set opposite their names:

Harris Filson, the sum of $2,072.50 with interest at three per cent. per annum from November 26th, 1904, and costs;

George Donaldson, the sum of $283.87, with interest at three per cent. per annum from November 26th, 1904, and costs;

William D. Allen, the sum of $472 with interest at three per cent. per annum from November 26th, 1904, and costs;
Rudolph Treiss, the sum of $3,087.50 with interest at three per cent. per annum from November 26th, 1904, and costs.

5. The claims of the following claimants should be dismissed, with costs:

Edward T. Little,
Malcolm N. Butler,
John M. Davies.

6. Any surplus that may remain in the hands of the trustees, after the foregoing deliveries and payments should be transferred by them to the general estate in bankruptcy to be administered according to law, free and clear of any claims and demands of any party to this proceeding.

Dated August 22nd, 1905.

Respectfully submitted,

STANLEY W. DEXTER,
United States Special Master.

(Endorsed:)—Report on Hanover Bank proceedings.—Filed Aug. 29, 1905.

61 United States District Court, Southern District of New York.

In the Matter of JACOB BERRY & COMPANY, Bankrupts.

SIRS: Please take notice that the report of the Honorable Stanley W. Dexter, to whom as special commissioner, was referred the hearing on the claims of the various customers of the above-named bankrupt, whose stock was pledged to the Hanover National Bank, has been filed in the office of the Clerk of the United States District Court; said report being dated the 22d day of August, 1905; that we will move the consideration of said report at a stated Term of this Court, held on the 13th day of September, 1905, at the Post Office Building in the Borough of Manhattan, City of New York, at 10.30 in the forenoon, or as soon thereafter as counsel can be heard, and at such time we will move for a confirmation of the said report in the case of the claim of Edward T. Little, Malcolm N. Butler, and J. M. Davies, and will move for a rejection of the said report on the findings on the claims of the Trustees in Bankruptcy, Harris Fillson, George E. Donaldson, George E. Hall, Anna D. Taggart, N. C. Bowers, W. D. Allen, and Rudolph Treiss, and for

the rewarding of costs and for such other and further relief
62 as may be just and proper in the premises.
Dated New York, September 9th, 1905.

Yours, etc., JAMES, SCHELL & ELKUS,
Attorneys for Trustees.

Office and Post Office Address, 50 Pine Street, Borough of Manhattan, City of New York.

To Sidner Ossoski, Esq.,
27 William St.,
Att'y for Edward T. Little.
Messrs. Sweezy & Glover,
62 William St.,
Att'y for Harris Fillson.
E. C. Chappell, Esq.,
335 Broadway,
Att'y for George F. Donaldson.
Messrs. Simpson, Thacher & Bartlett,
25 Broad St.,
Att'y for Anna D. Taggart.
Henry C. Pogson, Esq..
40 Wall St.,
Att'y for Malcolm N. Butler.
J. Washington Togue,
Att'y for W. D. Allen.
Messrs. Kurzman & Frankenheimer,
25 Broad,
Att'y for Rudolph Treiss.
Messrs. Conway, Reed & Potter,
21 Cortlandt,
Att'y for J. M. Davies.
Samuel Bitterman, Esq.,
280 Broadway,
Att'y for W. C. Bowers.
Albert W. Putnam,
32 Liberty,
Att'y for George E. Hall.

63 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Archie McBride, being duly sworn, deposes and says: That he is over the age of eighteen years, that he served a copy of the annexed notice of motion to move for a consideration of a report of the Hon. Stanley W. Dexter, upon Sweezy & Glover, attorneys for Harris Fillson, and Albert W. Putnam, attorney for George E. Hall, at their respective offices, 62 William street and 32 Liberty street, by leaving a copy of the said notice of motion in the offices of said attorneys with the person in charge of said offices. Deponent further avers

that at the time of said service the attorneys above named were not in their respective offices.

ARCHIE G. McBRIDE.

Sworn to before me this 11th day of September, 1905.
NATHANIEL WALKOF,
Notary Public, No. 78, *New York County.*

(Endorsed:)—Notice of Motion (Hanover National Bank). Filed Sept. 27, 1905.—Referee's report confirmed.—See Memorandum.—Filed Oct. 12, 1905.—G. C. H.

64 United States District Court, Southern District of New York.
In Bankruptcy.

No. 7604.

In the Matter of JACOB BERRY & COMPANY, Bankrupts.

In re HANOVER BANK Proceeding *In re* Claim of RABORG & MANICE.

James, Schell & Elkus (James M. Rosenberg & Robert P. Levis, of counsel) for Trustees.

Albert W. Putnam & George O. Redington, for claimant, George E. Hall.

Simpson, Thacher & Bartlett, (Graham Sumner, of counsel), for claimant Anna D. Taggart.

Sweezy & Glover (Richard L. Sweezy, of counsel), for claimant Harris Fillson.

Samuel Bitterman, for claimant, W. C. Bowers.

Simpson, Werner & Cardozo (Benjamin N. Cardozo of counsel) for claimants, Raburg & Manice.

HOLT, *J.:*

I concur with the Referee's conclusions in his report in the
65 omnibus proceeding. The Trustee's counsel have made an elaborate argument in respect to the relation of customer and broker. Many different theories have been suggested as to the nature of this relation. It is sometimes said to be analogous to that of principal and agent, or pledgor and pledgee, or vendor and vendee. The truth is that the legal relation between a customer and a broker is peculiar, and, while it has some of the features of the relation between principal and agent, pledgor and pledgee, and vendor and vendee, it is dangerous to attempt to determine the right of customer and broker by the strict rules of law applicable to such relations. The case of Markham *v.* Jandon (41 N. Y., 235), which applied the principles governing the relation of pledgor and pledgee very strictly to the case of a customer and broker, has since been considerably modified in this State; but the relations of customer and broker undoubtedly are still largely governed by the rules applicable

to the case of pledgor and pledgee. I think that Mr. Dexter has correctly applied the law established by the authorities to the different cases embraced in his report. I have felt some hesitation whether his ruling as to the effect of the proof of claim by George E. Hall is correct, but upon the whole I concur with his conclusions in that respect.

I am not able to concur with Mr. Dexter's report in the separate proceeding brought in regard to the claim of Raborg & Manice. I think that money paid under a mistake of fact gives use to a constructive trust in the hands of the person receiving it; that its owner can reclaim it so long as he can identify it; that the $1,500 in question having been deposited in the bank, and the balance never having been thereafter reduced below $1,500, the amount is to be regarded as having been identified as a portion of the balance remaining in the bank; that Raborg & Manice had an equity,
66 as against the Hanover Bank, to have the Hanover Bank enforce its claims against the securities which it held as collateral before it enforced them against Berry & Co.'s deposit; and that, there having been a surplus of about $6,000, after the payment of the bank's claim, from the proceeds of the securities and the deposit, Raborg & Manice are entitled to receive the $1,500 from such surplus. The suggestion in the Referee's report that the securities belonged to customers, and that they had superior equities in them, as appeared by the evidence in the omnibus proceeding pending before him, I think was, strictly speaking, a matter which should not have been considered, as Raborg & Manice were not parties to that proceeding, and no evidence on that subject was given in the proceeding relating to their claim; but, as it appears in the omnibus proceeding that Berry & Co. had an interest in these securities amounting to about $10,000 over all the claims of the owners of securities pledged, I think that Raborg & Manice's right to recover, is not complicated by any question of the interest of the owners of the securities.

My conclusion is that the Referee's report in the omnibus proceeding should be confirmed, but that his report upon the claim of Raborg & Manice should not be confirmed, and that that claim should be allowed.

G. C. H.

October 12, 1905.

(Endorsed:)—No. 169.—United States District Court, Southern District of New York.—In Bankruptcy.—In the Matter of Jacob Berry & Company, Bankrupts.—*In re* Hanover Bank Proceeding *In re* Claim of Raborg & Manice.—Memorandum.—Holt, *J.*

67 United States District Court, Southern District of New York.

In the Matter of JACOB BERRY and HAROLD L. BENNETT, Individually and Trading as Jacob Berry & Co.

SIRS: Please take notice that annexed hereto is the copy of an order which will be presented to the Honorable George C. Holt for signature and settlement, at his chamber in the Post Office Building, Borough of Manhattan, City of New York, on the 23d day of October, 1905, at ten o'clock in the forenoon.

Dated New York, October 30th, 1905.

Yours, etc., JAMES, SCHELL & ELKUS,
Attorneys for Trustees.

Office & P. O. Address, 50 Pine St. and 346 Broadway, Borough of Manhattan, City of New York.

To Simpson, Thacher & Bartlett, Esqs.,
Att'ys for Anna D. Taggart,
25 Broad St.,
New York City.

Sweezy & Glover, Esqs.,
Att'ys for Harris Filson,
62 William St.,
New York City.

Everett T. Chappell, Esq.,
Att'y for George Donaldson,
320 Broadway,
New York City.

Albert W. Putnam, Esq.,
Att'y for George E. Hall,
32 Liberty St.,
New York City.

Samuel Bitterman,
Att'y for William C. Bowers,
280 Broadway,
New York City.

68 At a stated term of the United States District Court for the Southern District of New York, held at the Post Office Building, Borough of Manhattan, City of New York, on the — day of October, 1905.

Present: Hon. George C. Holt, District Judge.

In the Matter of JACOB BERRY and HAROLD L. BENNET, Trading as Jacob Berry & Company, Bankrupt.

An order having been made by this Court on the 25th day of March, 1905, referring to the Honorable Stanley W. Dexter, as Special Commissioner, the adjustment and determination of all rights, claims and liens in and to any certificates of stock or the pro-

ceeds thereof, pledged to the Hanover National Bank by the above named bankrupt, and an order having been made by the Honorable Stanley W. Dexter, dated May 4th, 1905, giving notice of a hearing to all who filed claims to any of the said certificates of stock or the proceeds thereof, and the said Special Commissioner having duly heard the proofs presented by the various claimants and by the Trustees in Bankruptcy, and a report having been made by the said Special Commissioner on the 22d day of August, 1905, and said report having come on for hearing before this Court on the 4th day of October, 1905.

69 Now, upon reading and filing the order made by the Honorable George C. Holt on the 25th day of March, 1905, referring to the Honorable Stanley W. Dexter, as Special Commissioner, the adjustment and determination of all rights, equities and claims and liens, in and to any certificates of stock or the proceeds thereof, pledged to the Hanover National Bank by the bankrupt, and upon reading and filing notices of claim of the said stock, made by Anna D. Taggart, Harris Filson, George Donaldson, George E. Hall and William C. Bowers, and upon reading and filing the order of the Honorable Stanley W. Dexter, dated May 4th, 1905, giving notice of a hearing to be held on the 16th day of May, 1905, at which testimony was to be taken from all those who had filed claims, and upon reading and filing the affidavit of Robert P. Lewis, of the mailing of a copy of the said order to all who had filed claims against the said stock or their proceeds, and upon reading and filing the testimony and proof presented by Anna D. Taggart, Harris Fillson, George Donaldson, George E. Hall and William C. Bowers, and upon reading and filing the report of Stanley W. Dexter, dated the 22d day of August, 1905, finding, among other things, that Anna D. Taggart, Harris Filson, George Donaldson, George E. Hall and William C. Bowers are entitled to certain certificates of stock or the proceeds thereof, and upon the notice of motion that the consideration of the said report would be brought on for hearing before this Court, at which time the Trustees would move for the affirmance of the said report in part and for its overruling in part, and after hearing Graham Sumner, of counsel for Anna D. Taggart, Richard L. Sweezy, of counsel for Harris Filson, Everett T. Chappell, of counsel for George Donaldson, Albert W. Putnam, of counsel for Geo. E. Hall, and Samuel Bitterman, of counsel for William

70 C. Bowers, in support of a confirmation of the report of the Honorable Stanley W. Dexter, and James N. Rosenberg, of counsel for the Trustees in Bankruptcy, in opposition to the said report so far as these claimants were concerned, and after due deliberation, it is, on motion of the respective attorneys for the respective claimants appearing herein

Ordered that the report of the Honorable Stanley W. Dexter, as Special Commissioner, dated the 22d day of August, 1905, be and in all respects is hereby confirmed as to the claims of the said Anna D. Taggart, Harris Filson, George Donaldson, George E. Hall and William C. Bowers; and it is further

Ordered that Edward S. Thomas, Lloyd M. Howell and Ashbell P.

Fitch, Jr., as Trustees in Bankruptcy of the above named bankrupt, shall deliver over certain certificates or the proceeds thereof, to the various claimants as follows:

To Simpson, Thacher & Bartlett, attorneys for Anna D. Taggart, certificate No. C15,546 for fifty shares of the preferred stock of the United States Steel Corporation, and Certificate No. A30,563, for thirty-three shares of the preferred stock of the United States Steel Corporation, and the said Trustees pay to the said Anna D. Taggart or to her attorneys, Messrs. Simpson, Thacher & Bartlett, the sum of $46 45/100 ($46 45/100) for the costs of this proceeding.

To Harris Filson, or his attorneys, Messrs. Sweezey & Glover, the said Trustees are directed to pay the sum of two thousand and seventy-two dollars and fifty cents ($2,072.50), together with interest at 3 per cent. per annum from November 26th, 1904, amounting to fifty-six dollars and forty-eight cents ($56.48), together with the sum of twenty dollars ($20) for the costs of this proceeding, amounting in all to two thousand one hundred and forty-
71 eight dollars and ninety-eight cents ($2,148.98).

To George Donaldson, or to his attorney, Everett T. Chappell, the said Trustees are directed to pay the sum of two hundred and eighty-three dollars and eighty-seven cents ($283.87), together with interest at 3 per cent. per annum from November 26th, 1904, amounting to six dollars and seventy-four cents ($6.74), together with the sum of twenty dollars ($20), for the costs of this proceeding, amounting in all to three hundred and ten dollars and sixty-one cents ($310.61).

To George E. Hall, or his attorney, Albert W. Putnam, the said Trustees are directed to deliver certificate No. 47,114 for ten (10) shares of the common stock of the United States Steel Corporation, and the said Trustees shall pay over to the said George E. Hall or to his attorney, Albert W. Putnam, the sum of twenty dollars ($20) for the costs of this proceeding.

To William C. Bowers, or his attorney, Samuel Bitterman, the said Trustees are directed to deliver Certificate No. 64,640 for two (2) shares of the capital stock of the New York, New Haven & Hartford Railroad, and the said Trustees shall pay over to the said William C. Bowers or his attorney, Samuel Bitterman the sum of twenty dollars ($20) for the costs of this proceeding.

Dated New York, October 23, 1905.

GEO. C. HOLT, *J.*

(Endorsed:) Notice of Settlement.—Filed Oct. 23/05.

72 United States District Court, Southern District of New York.

In the Matter of JACOB BERRY & COMPANY, Bankrupts.

Please take notice that Harris Filson claims to be entitled to a lien upon the moneys and securities turned over, under order of this Court, by the Hanover National Bank, to the Receiver in the above entitled matter, and which moneys and securities have come into the

hands of the Trustees herein; the basis of such claim of said Harris Filson, being that he was the owner of twenty shares preferred stock of the Atchison, Topeka and Santa Fe Railroad Company, which were pledged by said Jacob Berry and Company to the said Hanover National Bank, together with other collateral for the loan made by said bank to said Jacob Berry & Company, and which said stock belonging to said Filson, was sold by said bank, and the proceeds received by them.

The said claim of said Filson has heretobefore been made the subject of a special order of reference made by the Court to you herein, dated the 24th day of December, 1904.

Dated New York, April 18, 1905.

SWEEZY & GLOVER,
Attorneys for Harris Filson, Claimant,
62 *William St., New York.*

To Stanley W. Dexter, Esq., Referee.
James, Schell & Elkus, Attorneys for Trustees.

(Endorsed:) Notice of Claim *In re* Hanover Bank Securities and money.

73 NEW YORK, *May 17th*, 1905.

Before Stanley W. Dexter, Esq., Referee in Bankruptcy.

Appearances.

Messrs. James, Schell and Elkus, by Mr. Elkus, for the Trustees.
Messrs. Sweezey & Glover, by Mr. Sweezey, for the claimants.

Hearing on the claim of Harris Filson to twenty shares of Atchison stock deposited with and sold by the Hanover National Bank.

It is stipulated that the order of reference made by the Hon. George C. Holt, made on the 24th day of December, being consolidated with the present proceeding under the order of Judge Holt referring the entire matter of the Hanover Bank claimants to the Referee.

HARRIS FILSON, a witness called on his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. SWEEZEY:

Q. Mr. Filson, you are the claimant in this matter?
A. Yes, sir.
Q. And did you have business transactions with the firm of Jacob Berry & Company?
A. Yes, sir.
Q. Did you have an account with them at the time they failed?
A. Yes, sir.

Q. And is the paper which I show you a copy of that account down to the 25th day of November, 1904?

A. Yes, sir.

74 Q. Do you recollect whether that was the last day that Jacob Berry & Company did business?

A. Yes, sir.

Q. Did they close their doors and make an assignment at the end of that day?

A. Yes, sir.

Q. Now, then, this copy of account I show you have you personally verified that by comparison with the books of Berry & Company?

A. Yes, sir.

Q. It was furnished to you, was it, down to the 1st of November by Berry & Company's bookkeeper, and the additions were made by the expert bookkeeper employed by the Receiver in this matter?

A. Yes, sir.

Q. Now, Mr. Filson, will you state how your account with Berry & Company stood on the morning of the 25th of November, 1904?

A. On that morning my account showed that they were carrying for me on the long side, ten Steel common, ten American Car & Foundry, ten Wabash common and forty Pennsylvania.

Q. They were carrying on the short side for you what?

A. Twenty Atchison preferred, ten Erie, first preferred, ten United States Steel preferred and ten Amalgamated, and they owed me a cash balance of $3,105.97.

Q. That is the way the account stood at the opening of the day on the 25th of November last?

A. Yes.

Q. Now Pennsylvania shares are what is known as half shares are they not?

A. Yes, sir.

Q. Then the forty Pennsylvania was equivalent under the practice of the Stock Exchange to twenty regular shares?

A. That is right.

75 Q. Then they were carrying sixty whole shares short and fifty whole shares long?

A. Yes, sir.

Q. And in addition they had a cash balance in your favor of $3,105?

A. And ninety-seven cents.

Q. In other words, they had a cash margin of over $30 for every share of stock they were carrying for you on either side of the market?

Mr. LEVIS: I object to that as in no wise stating the value of the stock. There has nothing been proven as yet as to the face value of these shares.

Q. Those were all $100 shares except the Pennsylvania shares?

A. Yes, sir. On the basis of twenty shares instead of forty it would make the Pennsylvania $100 shares.

Q. In other words, they had a margin, a cash margin of $30 per

share on each share of stock they were carrying for you on both sides of the market?

Mr. LEVIS: Objected to as incompetent, immaterial and irrelevant.

Q. Now, then, Mr. Filson, did you have any transactions with Jacob Berry & Company on the 25th day of November last?

A. Yes, sir.

Q. Just state what those transactions were?

A. I went in there that morning to see about twenty shares of Pennsylvania stock which some weeks previously had been ordered transferred to my wife's name, which certificates I had not received. They told me in the cashier's office that they had no record of the stocks having been ordered to be transferred. Having since that time purchased twenty more shares of Pennsylvania,
76 making forty in all, I desire to have the whole forty shares transferred.

By Mr. LEVIS:

Q. Did you so state to the cashier? Please don't give me your desires. What did you state to the cashier?

A. I stated this part to the bookkeeper. Having found the cashier had no record of the prior order I went to the bookkeeper because he could tell how my account stood and what was necessary for me to do in order to secure that transfer of the forty shares of Pennsylvania. I had taken down with me a certificate for ten shares of preferred Atchison, and I asked him to figure up my account and let me know whether with the putting in of this certificate for ten shares of Atchison preferred it would leave my account in satisfactory shape to have these forty shares of Pennsylvania transferred. He said it could be transferred, but it would leave so small a margin that they wouldn't consider it sufficient to properly carry the open trades on my account. I then went back to my safe deposit box and got down another certificate for ten shares of Atchison preferred and a certificate for ten shares of Erie, First Preferred. This I handed to the cashier, taking his receipt for them and gave him instructions to transfer to my wife's name forty shares of Pennsylvania stock, and in order that there should be no mistake about doing it, instead of holding the stocks for me to call for, the certificates of the Pennsylvania stock, after they were transferred, were to be sent to me by registered mail.

Q. Did he tell you he would send them to you by registered mail? Please limit yourself to the conversation?

A. Yes, sir.

Q. Who was this that you had this conversation with?
77 A. A young man in the cashier's office.

Q. Do you know his name?

A. I do not.

Q. Had you ever dealt with him before?

A. I think I had.

Q. Do you know? Did you ever see the man before?

A. I saw the man in there before, yes.

Q. Was this an oral conversation or did you write out those instructions for him?

A. Oral.

Q. You gave him no written instructions at all?

A. No.

Q. Tell me exactly what he stated to you when you asked him to deliver finally at this last visit, the forty shares of Pennsylvania?

A. Tell you what?

Question repeated as follows:

"Q. Tell me exactly what he stated to you when you asked him to deliver finally at this last visit, the forty shares of Pennsylvania stock?"

A. I don't know that I can repeat his exact words. It was to the effect that he would have the stock transferred to me and sent to me by registered mail.

By Mr. SWEEZEY:

Q. You then delivered him those thirty shares of stock that you have spoken of?

A. Yes, sir.

Q. To the cashier?

A. To the cashier.

Q. He took your instructions?

A. And then I went to the bookkeeper and told him that I had deposited those two additional certificates with the cashier, and he told me that that left my account in every way in satisfactory
78 shape for the delivery of the forty shares of Pennsylvania and the carrying of my other trades on margin.

Q. You went there that morning of your own volition? There had been no call on you for additional margin from Berry & Company?

A. No, sir.

Q. What were the numbers of those certificates that you deposited that morning?

A. The Atchison certificates were 99,640 and 99,669, and the Erie First was L14,566. Each one of these certificates was for ten shares.

Q. Now, then, Mr. Filson, I understand you to say that at the close of that day Berry & Company closed their doors?

A. Yes, sir.

Q. And was any forty Pennsylvania ever transferred to you?

A. No, sir.

It is conceded by the attorneys for the Trustee that two certificates of Atchison Preferred stock, ten shares each, numbered respectively 99,669 and 99,640, were deposited by Jacob Berry & Company with the Hanover National Bank on the 25th day of November, 1904, as part collateral security for a loan of $45,000, and that those said stocks were sold out by the bank to repay themselves for this advance, and the amount realized at such sale of both certificates was $2,070.50.

It is conceded by the Trustees that on the morning of the 26th day of November there *is* no certificates or number of certificates of Pennsylvania stock which have come into the hands of the Receiver, nor was there deposited with their bank as collateral security for the respective loans any stock of the Pennsylvania R. R. but the Trustees make no concession as to whether Berry & Company
79 dealt in Pennsylvania stock on the 25th day of November, 1904.

Mr. SWEEZEY: I offer in evidence the schedules in this matter showing the financial condition of Berry & Company on the 25th of November, when they suspended business.

Cross-examination by Mr. LEVIS:

Q. Mr. Filson, will you tell me what particular stocks you were carrying short on the 25th day of November, 1904, in the morning?

A. Twenty Atchison preferred, ten Erie first preferred, ten Steel preferred, ten Copper.

Q. When you asked to have returned to you these forty shares of Pennsylvania was it stated to you by the cashier what stocks you would deliver to Jacob Berry & Company?

A. No, sir.

Q. Did they state to you you must deliver the same stocks you were carrying short?

A. No, sir.

Q. You did deliver, however, did you not, twenty shares of Atchison preferred and ten shares of Erie first preferred?

A. Yes, sir.

Q. Those same stocks you were carrying on the other side short were you not?

A. Yes, sir.

Q. Was this purpose of that delivery to complete the short orders?

A. No, sir.

Q. Can you give any reason why you delivered just exactly twenty shares of Atchison preferred and ten shares of Erie first preferred, both of which you were carrying short at that time?

A. They were the ones most convenient for me to deliver
80 at the time. Some of those certificates were in my wife's name and needed her endorsement in order to make them available for the use of Berry & Company. These certificates I had in the box were either in my name or in her name and endorsed by her so that I could handle them at once.

Q. Wasn't there any agreement made at that time that you would take up your short stocks?

A. No, sir.

Q. Did you state that at the first meeting with Jacob Berry & Company on that morning that you would deliver just those twenty shares of Atchison and ten shares of Erie first preferred?

A. No, sir.

Q. You told me that you went down with ten shares of Atchison preferred, did you not?

A. Yes, sir.

Q. Was it stated to you just how much stock you would have to deliver in order to release the forty shares of Pennsylvania?

A. No, sir.

Q. Did you ascertain at that time how much cash margin you had with Jacob Berry & Company at the first meeting?

A. Just roughly.

Q. How much did they tell you was your cash margin?

A. My recollection on that point is a little bit hazy, but if I remember rightly the bookkeeper told me that if I took out this Pennsylvania stock it would be something like $300 or $400 to carry the open trades.

Q. He told you that it would be $300 or $400?

A. No, that that would leave—if he delivered this stock to me,—it would leave only that balance.

Q. And he didn't ask you to deliver just those specific shares?

A. No, sir. In fact when I left him to go up and get the
81 certificates out of the box I didn't know just what I would bring down there until I went over them.

Q. Did you also yourself have in the box ten shares of United States Steel preferred and ten of Amalgamated Copper?

A. I had the Copper there.

Q. Do I understand then, Mr. Filson, that you owned certificates of exactly the duplicate amount of the certificates which you were carrying short with Jacob Berry & Company?

A. I wouldn't be sure about the United States Steel, but I had certificates of all those shares.

Q. And when did you purchase those certificates of Atchison preferred?

A. I would have to go over the books to tell you that. I had been carrying them for some time.

Q. You had owned them for more than a month?

A. Oh, yes.

Q. When you delivered those twenty shares of Atchison preferred to Jacob Berry & Company or his cashier, was a receipt given you?

A. Yes, sir.

Q. Are those the two receipts which were given you at the time? (Showing receipts to witness.)

A. Yes, sir.

Q. Did you read those receipts at the time of their delivery?

A. Only as to the written part.

Q. You had previously dealt with Jacob Berry & Company, had you not?

A. Yes, sir.

Q. Had you ever delivered them any stocks before as security for accounts?

A. Oh, yes; either as security for accounts or in course of trades.

Q. You had read this form of receipt before, had you not? You knew what was in this form of receipt, didn't you?

82 A. I presume I have read receipts of that class before.

Q. Don't you know you had read this particular receipt of Jacob Berry & Company?

A. I don't know.

Mr. LEVIS: I offer those two receipts in evidence.

Received in evidence and marked, Trustees' Exhibits Nos. 1 and 2, respectively.

Trustee's Exhibit No. 2 is as follows:

NEW YORK, *Nov. 25th*, 1904.

Received from Harris Wilson,
10 Atch. Pfd. No. 99,640, 10 Erie, 1st Pfd., 14,566.

The same to be a general deposit, and this receipt is given and received with the mutual understanding that Jacob Berry & Company may hold the same as margin, and as security for or apply the deposit in part payment of or on account of losses on any or all transactions in the purchase or sale of stocks, bonds, securities or commodities, made by them for your accounts.

This receipt is given and received upon the further understanding and agreement in consideration of Jacob Berry & Company, executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone; that the said Jacob Berry & Co., *may repledge, rehypothicate or loan any or all of said stocks*, bonds, securities or commodities held by them on account thereof as *margin or otherwise; may substitute similar stocks, bonds*, securities
83 *or commodities therefor*, and that said Jacob Berry & Company, may, without notice upon the approximate exhaustion of margins sell, or but as the case may be, any stocks, bonds, securities or commodities bought or sold or held by them as collateral, or margin, or otherwise, and that in case of contracts for future delivery that said Jacob Berry & Company may close the same by purchase or sale, as the case may be, without notice, provided, however, that such purchases or sales be made either upon the Consolidated Stock and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or in any other Exchange in the City of New York where such stocks, bonds, securities or commodities are dealt in.

(Signed) JACOB BERRY & CO.
W.

Q. As I understand it, Mr. Filson, you were short exactly the same stocks, which you delivered on the 25th day of November?

A. Yes, sir.

Q. How soon after the delivery did you go to the Receiver or the Receiver's accountant to find out what became of those stocks?

A. It must have been the beginning of the following week.

Q. It was before the election of the Trustee?

A. Oh, yes.

Q. What did you find out after going over the books of Jacob Berry & Company with reference to these shares of Atchison preferred stock?

A. That they had been put into the Hanover Bank loan and sold.

Q. From whom did you gain the information that they had been sold?

A. From the representative of the accountant.

84 Q. You didn't go to the bank to find out whether they sold them?

A. No, they showed us a letter from the bank there which gave a list of the securities on hand, and a list of the securities that were sold.

Q. Did you file a proof of claim in this proceeding?

A. No.

Q. You did not vote for the election of the Trustee at the first meeting of creditors?

A. I did not.

Q. Did Jacob Berry & Company or their cashier say anything to you that morning that they were acquiring any additional securities for your account?

A. No, sir.

Q. And exactly for what purpose did you deposit those twenty shares of Atchison preferred and ten shares of Erie first preferred?

A. For the sole and only purpose of securing the transfer to my wife's name for forty shares of Pennsylvania stock.

Q. And as I understand it you didn't give them any written order to transfer this stock to your wife's name?

A. No, sir.

Q. This account, am I not correct, Mr. Filson, was in the name of Harris Filson as Trustee?

A. No, sir.

Q. Was any of the stock in the name of Harris Filson as Trustee?

A. Any of the stock that they were carrying for me?

Q. Yes.

A. No, sir.

Q. Was any of the stock which you delivered to them in the name of Harris Filson as Trustee?

A. Yes, sir.

Q. Which stock?

85 A. Erie first preferred.

Q. Did either of the shares of Atchison preferred stand in the name of Harris Filson as Trustee?

A. No, sir.

Q. What was the name upon those certificates?

A. I won't be sure, but I think one of them was in my name and one in my wife's.

Q. Did I understand that they either were in your name or your wife's?

A. The only reason I hesitate about it is that some of those certificates which I was carrying I was carrying in a general name. You know how stock brokers will deliver you the stock transferred in blank on the back, and some may have been carried in that way.

Q. And you don't know the name appearing on those two certificates of Atchison preferred?

A. I do not know. I do know they were not in my name as Trustee.

Q. The ten shares of Erie first preferred in your name as Trustee, —who were you Trustee for?

A. My father's estate.

Q. Did either yourself or your wife endorse those certificates on the back at the time of the delivery to Jacob Berry & Company?

A. They were already endorsed.

Q. And you delivered those to Jacob Berry & Company to be used as security, as I understand it, for this margin account?

A. No, sir. They were to be used for the transfer of these forty shares of Pennsylvania.

Q. Let me again ask you,—they were to be used in substitution in that account for those forty shares of Pennsylvania were they not?

They were to take the place of the forty shares of Pennsylvania as collateral security for that margin account, isn't that correct?

A. The Pennsylvania stock was not security.

86 Q. Was the Pennsylvania stock purchased outright by you?

A. The putting in of those certificates was for the purpose of purchasing those Pennsylvania shares outright.

Mr. LEVIS: I move to strike that answer out as not responsive.

Q. Stock that you delivered then was to be used as the purchase price of the Pennsylvania stock?

Mr. SWEEZEY: I object to that. He has testified as to exactly what was said and done.

Objection overruled.

A. Yes, sir.

Q. You had not, up to the 25th day of November, 1904, paid in full for forty shares of Pennsylvania stock, had you?

A. No, sir.

Redirect examination by Mr. SWEEZEY:

Q. They had purchased, as you supposed, and as they stated to you upon your order, forty shares of Pennsylvania, is that the fact?

A. Yes, sir.

Q. And when you went there that morning you supposed they had in their possession forty shares of Pennsylvania for you, didn't you?

A. Yes, sir.

By Mr. LEVIS:

Q. Did you ask them whether they had or not?

A. I asked them as regards only twenty shares which were to have been delivered some weeks prior.

Q. And did they tell you they had those shares on hand?
87 A. They only answered me as to not having any record to transfer the stock.

By Mr. SWEEZEY:

Q. But you had ordered them to purchase it?
A. Yes, sir.
Q. And they had reported to you that they had purchased it?
A. Yes, sir.
Q. And you did not order them to sell it?
A. No, sir.
Q. And the condition of your account was as you stated that they were carrying this fifty shares,—Pennsylvania half shares, two shares making a whole share,—they were carrying the fifty shares of the stock for you long and fifty shares short, and they had this $3,000 cash?
A. Yes, sir.

Recross-examination by Mr. LEVIS:

Q. Did they ever report to you in writing that they had purchased these twenty shares of Pennsylvania Railroad stock?
A. Yes, sir.
Q. Have you a copy of that letter?
A. Yes.

(Witness produces receipt showing the purchase of twenty shares of Pennsylvania stock on the 17th day of November, 1904.)

Mr. LEVIS: I offer in evidence the letter produced by the witness.

Received in evidence and marked Trustee's Exhibit No. 3 of this date.

The signing of the deposition is waived.

88 *Re* Jacob Berry & Co. (Hanover Bank).

NEW YORK, *May* 23*d*, 1905.

Further hearing before Stanley W. Dexter, Esq., *in re* the claim of Harris Filson.

Further redirect examination of HARRIS FILSON by Mr. Sweezy:

Q. Mr. Filson at the last hearing in this matter on cross-examination you were asked in substance if the stocks that you delivered to Berry & Company on November 25th, 1904, were not to be used as the purchase price of the 40 shares of Pennsylvania stock that they were carrying for you and answered "yes" if you wish to make any explanation or correction of that answer please do so.

A. I ought to have said that the stocks were delivered in substitution for the Pennsylvania stock—for the sole purpose of securing the release of the Pennsylvania stock and to be held by Berry & Company in place thereof.

Cross-examination by Mr. LEVIS:

Q. Mr. Filson, had you paid in full for the 40 shares of Pennsylvania stock?
A. No.
Q. Which was standing in the hands of Jacob Berry & Company?
A. No.
Q. You did not at the time you deposited Atchison and Erie Preferred deposit any money in payment of that Pennsylvania stock, did you?
A. No, sir.
Q. So then at the time you deposited the Erie First Preferred and the Atchison stock there was money owing by you on the Pennsylvania stock, is that correct?
A. Yes.
89 Q. And you deposited no money at the time of this transaction?
A. No, sir.
Q. With whom did you deal at the time you deposited this Erie and Atchison stock?
A. The bookkeeper. A young man in the cashier's office.
Q. Which bookkeeper?
A. The head bookkeeper there, I don't recall his name now.
Q. Was it Mr. Hopkins?
A. No.
Q. Was it Mr. Coakley?
A. No, Coakley was not the bookkeeper.
Q. What was the gentleman's name?
A. I think the gentleman's name commenced with B.
Q. You told him, as I understand, at that time that you wanted to take this Pennsylvania which had not been paid for in full, is that correct?
A. I did not state it in that way. I told him I wanted to have the Pennsylvania stock transferred to me.
Q. And he told you it would be necessary to deliver more stock to him?
A. Yes, sir.
Q. And did he state to you anything about any further payments on the Pennsylvania, payment of any money?
A. No, sir.
Q. He looked up this account at that time to find out whether or not you had money enough to pay for this Pennsylvania stock?
A. Yes.
Q. What did he state to you?
A. Stated that I would need to put something more in there in order to have the Pennsylvania stock delivered to me.
90 Q. What other reason did he urge in that conversation?
A. That if they transferred the Pennsylvania stock to me that would not leave enough balance there to carry the remainder of my trades.

Q. Did he tell you just what shares he wanted delivered to him?
A. No.
Q. I have asked you this before, but, Mr. Filson, now in view of the qualification of your previous testimony I ask you again, how do you explain the fact that you delivered 20 shares of Atchison and 10 shares of Erie Preferred, or in short, just 20 shares of Atchison and just 10 shares of Erie Preferred, at that time?
A. For the same reason I gave you when I answered before.
Q. Didn't you deliver that stock in substitution of the shares which you were carrying short at that time?
A. No, sir.
Q. Have you owned just 20 shares of Atchison and 10 shares of Erie First Preferred before that time?
A. Yes, sir.
Q. Did not you purchase those shares to substitute in place of the shares they were carrying short for you?
A. No, sir.
Q. Did not they counsel you to do that?
A. No, sir.
Q. Didn't they state anything to you about the shares they were carrying short at that time?
A. No, sir.
Q. And you tell me now that the shares which you then had in your possession all the time happened to be just the very shares to number and kind, that you were carrying short with Jacob Berry & Company?
91 A. The stocks I delivered to them were the same kind of stocks that I was carrying because I was carrying other stocks in my box besides those I delivered to them.
Q. But the stocks you delivered to them happened to be just the shares which you were short—that Berry & Company were carrying short for you, that is correct, isn't it?
A. Yes.
Q. And you tell me you did deliver those in substitution—was not anything said about substituting for the shares they were carrying short at all?
A. No.
Q. Did you go over with this bookkeeper at the time, the names and kinds of the shares you were carrying short?
A. No, sir.
Q. When this account was gone over?
A. No, sir.
Q. You knew at that time that you were short 20 shares of Atchison and 10 shares of Erie First Preferred, did you not?
A. I might have known it by referring to my account, but I did not refer to the account. I did not take that into consideration.
Q. Well, you had gotten an account on the 1st of November, had you not?
A. Yes.
Q. And you had looked over that account?
A. Yes, sir.

Q. And you knew the trades that you were carrying with Jacob Berry & Company, didn't you?

A. In a general way, yes.

Q. Mr. Filson, how long before the time that you delivered this did you order Jacob Berry & Company to purchase short for you a certain number of shares of Atchison and Erie?

A. (No answer.)

Q. On the 24th and 26th they sold short for you 10 shares
92 of Erie First Preferred and 20 shares of Atchison, didn't they?

A. Yes, sir.

Q. When you delivered these Atchison and Erie First Preferred, those short sales transactions to which you have just testified, were still open, were they not?

A. Yes, sir.

Q. Had they ever asked you to make a delivery to cover the short transactions at all?

A. No, sir.

Q. And you are sure you never paid in full for the 40 shares of Pennsylvania which were being carried?

A. No, sir.

Q. And you desired at the time you delivered the stock to have the 40 shares of Pennsylvania transferred to your name, as I understand it?

A. That is, my wife's name.

Mr. LEVIS: That is all.

By Mr. SWEEZY:

Q. Mr. Filson, at the time you had made these short sales of Atchison and Erie with Berry & Company, did you have in your box here the 20 shares of Atchison and 10 shares of Erie you delivered on the 25th?

A. Yes, sir.

Q. And you owned them for some time before that?

A. Yes.

Q. And on the 25th of November when you deposited, as you have stated, the stocks under the terms you have stated, you had over $3,000 cash balance in your favor?

A. Yes.

93 By Mr. LEVIS:

Q. Mr. Filson, you have stated that there was a balance of over $3,000. Was that the balance what remained after deducting the money owing by you on the shares which were being carried short for you?

A. Taking all short and long sales into consideration.

Q. You are holding in your hands a statement. Has there been any subtraction for purchasers of stock which you were carrying short?

A. No, sir.

Q. Then that should be subtracted to determine the cash balance payable to you, shouldn't it, isn't that correct?

A. That is what I should understand.

Q. Then after subtracting the purchase price of the shares you were carrying short, the balance would not be $3,054, would it, the balance would be $2,800 net, wouldn't it?

A. Well, the question is that this balance approximately of $3,000 should be reduced by the reduction of——

Q. (Interrupting.) By the unpaid purchase price of the stock they were carrying short?

A. You would also have to add the selling price of the securities I was carrying long.

Q. There should be a deduction for the securities carried short?

A. I could not tell you without knowing what was the market value of the stock that day.

Q. Approximately?

A. At the prices here it would be something like $2,800 or $2,900.

Q. Then after deducting the shares which you were carrying short your balance would remain approximately $200 or $300, is that correct?

94 A. If you deduct the value of the stock sold short from that balance on hand would leave about $300.

Q. Now, the approximate value of the stock which you were carrying long at that time exclusive of the 40 shares of Pennsylvania which you wanted to have delivered to you was of what value?

A. About $1,550. I could not tell you that, because the amounts do not show on the statement.

A copy of the account of Harris Filson as appears upon the books of Jacob Berry & Company made by Perley Morse, expert accountant by the trustees is offered in evidence.

Received in evidence and marked Exhibit "A" of this date.

By Mr. Levis:

Q. Mr. Filson, what was the date of this purchase of the certificate of 20 shares of Atchison and 10 shares of Erie First Preferred, if you know?

A. I couldn't tell you that; it was some time prior to this statement which I have here which goes back to August.

Q. What date appears upon this certificate, do you know?

A. No, I do not.

Q. How long before this time had you had this stock in your possession, how long before the delivery on the 25th day of November?

A. I can only state from the statement I have here which goes back to August that it was some time prior to that, just the date I cannot tell you.

Q. But you know exactly what the prices were?

A. I know exactly what the prices were.

Q. But you don't know the date?

A. No, I do not.

95 TRUSTEE'S EXHIBIT No. 3.

Jacob Berry. H. L. Bennet.

Jacob Berry & Co., Bankers & Brokers, 42 Broadway.

NEW YORK, 10/17, 1904.

Mr. H. Filson:

It is understood and agreed that all orders to buy and sell stocks, bonds, securities or commodities are to be executed in accordance with and subject to the rules and customs of the Consolidated Stock and Petroleum Exchange of New York, or the Exchange where such transactions are made, and all orders executed by Jacob Berry & Co. are accepted whether the order be given in writing, orally, or by telegraph or telephone. It is agreed that Jacob Berry & Co. is appointed as agent to receive and deliver stocks, bonds, securities or commodities bought or sold for my account, with power to hypothecate, rehypothecate, pledge and repledge or loan any of said stocks, bonds, securities or commodities, and to substitute similar stocks, bonds, securities or commodities therefor, and the said Jacob Berry & Co. are authorized upon the approximate exhaustion of margin, without notice to me, to buy or sell as the case may be, any stocks, bonds, securities or commodities held by them for my account as collateral for margin or otherwise, provided such purchase or sale be made upon Consolidated Stock & Petroleum Exchange of New York, the New York Stock Exchange, Chicago Board of Trade, or upon any other Exchange in the City of New York where such stocks, bonds, securities or commodities are dealt in.

We have this day bought for your account and risk, subject to above conditions:

20 Penn. 135-7/8 Conckling

JACOB BERRY & CO.,
Per S.

96 *Statement of the Account of Harris E. Filson.*

1904.		Dr.	
Aug. 31st,	Long, 10 Erie,	10 Steel c.....	10 C & F c.
		10 Wab. c.....	
Oct. 17th,	20 Pa.,	135⅞	1360.00
19th,	10 O & W	Rec'd.....	
20th,	10 Steel Pfd	Rec'd.....	
25th,	10 Erie	40⅛	402.58
31st,	Int.	....	4.31
	Balance,	....	4435.97
			6202.78
Oct. 31st,	Long 10 Steel,	10 C & F. c.....	
	10 Wab. c.	....	
Nov. 1st,	20 Pa.	135	1351.25
14th,	10 Mex. Cent.	20¼	203.75
18th,	20 Pa.	137½.....	1372.50
22nd,	20 Pa.	135½.....	1356.25
			4283.75
25th,	20 Atch. pfd 10 Erie 1st pfd	Rec'd	

		Cr.	
Aug. 31st,	By balance.....		1076.53
	Short, 10 O & W, 10 Steel pfd.....		
Oct. 22d,	10 Erie,	39⅛.....	390.00
24th,	10 Atch. pfd	102.....	1018.75
25th,	10 Erie,	41.....	408.75
26th,	10 Erie, 1st pfd	72¾.....	726.25
	10 Mex. Cent.	18½.....	183.75
	10 Atch. pfd	101⅝.....	1017.50
31st,	20 Pa.	138¼.....	1381.25
			6202.78
Oct. 31st,	By balance.....		4435.97
Oct. 31st,	Short, 20 Atch. pfd		
	10 Erie 1st pfd		
	10 Mex. Cent.		
Nov. 3rd,	10 Steel pfd.	81½.....	813.75
	20 Pa.	137½.....	1373.75
15th,	Cop.	76¾.....	766.25
			7389.72

97 NEW YORK, *May 19th*, 1905.

Before Stanley W. Dexter, Esq., Special Commissioner.

Appearances.

Messrs. James, Schell & Elkus, Attorneys for the Trustees (Mr. Levis of Counsel).
Messrs. Simpson, Thacher & Bartlett, Attorneys for the Claimant Anna D. Taggart (Mr. Sumner of Counsel).
Mr. W. Underhill, for Creditors.
Messrs. Kurzman & Frankenheimer, Attorneys for Creditors (Mr. Gutman, of Counsel).
Mr. R. L. Cutting, by Representative.

Hearing on Claim of Anna D. Taggart for the Recovery of Eighty-three Shares of United States Steel Preferred Stock and Other Securities, as Provided in the Notice of Claim.

Appearances.

Messrs. Simpson, Thacher & Bartlett, Attorneys for the Claimant (Mr. Sumner, of Counsel).
Messrs. James, Schell & Elkus, Attorneys for the Trustees (Mr. Levis of Counsel).

ANNA D. TAGGART, the claimant herein, a witness called on her own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. SUMNER:

Q. Mrs. Taggart, did you at one time have an account with Jacob Berry & Company for the purchase and sale of stocks?
98 A. I did.
Q. Can you say about when you opened that account with them?
A. In January, I bought five shares of Erie.
Q. What year was that?
A. 1903.
Q. Did you then buy any stocks outright?
A. I then bought five shares of Erie which I now have.
Q. And that was delivered to you by Jacob Berry & Company?
A. Yes, sir; in Philadelphia by their representative there.
Q. And was it paid for by you in full?
A. Paid for in full.
Q. Did you subsequently give to Berry & Company any orders for the purchase or sale of stock?
A. I did, with Mr. Davis.
Q. Who is Mr. Davis?
A. He was the representative of Berry & Company in Philadelphia.
Q. Was he the manager for their Philadelphia office?

A. He was the manager for their Philadelphia office.

Q. I show a piece of paper purporting to be a statement of your account with Berry & Company and ask you whether you ever gave to Jacob Berry & Company any orders for the purchase of stock which are not shown on those statements? (Handing paper to witness.)

A. I do not know. I gave orders.

Q. Did you give to Jacob Berry & Company orders for the purchase and sale of stock which are shown on these statements?

A. I gave the orders.

Q. For the purchase and sale of stock which are shown on this statement?

A. I do not know about the sale. I do not know any-
99 thing about those, because I have not received any money since I gave them the eighty-three shares.

Q. You gave orders for the purchases which are shown on these statements, did you not?

A. I gave the orders which are shown there; yes, I did.

Q. And you also gave orders, did you not for the sales which are shown on these statements?

A. Yes, I did.

Q. Now, did you give to Jacob Berry & Company any other orders for the purchase and sale of stock?

A. No.

Q. Do you know Mrs. Taggart of your own knowledge whether or not any purchases were ever executed by Jacob Berry & Company?

A. I do not.

Q. Except the five shares of Erie which you have already answered you received?

A. I have that; I have received that.

Q. Where did you receive statements?

A. They sent them to me each month wherever I happened to be.

Q. Through the mail?

A. Yes, through the mail.

Mr. SUMNER: I offer in evidence seven papers purporting to be accounts rendered to Anna D. Taggart by Jacob Berry & Company, dating from December, 1903, to November, 1904.

The papers are received in evidence and marked collectively Taggart Exhibit A of this date.

Mr. SUMNER: I will offer in evidence another paper.

The paper is received in evidence and marked Taggart Exhibit B of this date.

100 (It is stipulated that Exhibit B of this date was received by Mrs. Taggart's attorneys from the expert accountant of the trustees, which purports to show the condition of the account on the 26th day of November, 1904, the date of the assignment.)

Q. Mrs. Taggart, did you prior to September 14th, 1904, own and have in your possession eighty-three shares of the preferred stock of the United States Steel Corporation?

A. I did.

Q. By how many certificates was that stock represented?
A. By two.
Q. Do you remember the amount of each certificates?
A. Yes, fifty shares and thirty shares.
Q. Were the certificates in your name?
A. The certificates were in my name.
Q. Did you deliver those certificates to Jacob Berry & Company?
A. I gave them to Mr. Coakley, the New York representative—I gave them to Mr. Davis in Philadelphia at the suggestion of Mr. Coakley of New York.
Q. Who is Mr. Coakley?
A. He is the manager—he was manager of Berry & Company.
Q. In the New York office?
A. In New York.
Q. Did you have a conversation with him in the New York office just before giving those certificates to Berry & Company?
A. Yes, I called upon him.
Q. Please state the substance of the conversation?
A. He suggested that if I had some stock, if I would give
101 it to them they would make some money for me. I then told — I had some steel shares and he said, "Very well, we will try and make you a nice profit." He asked me how many shares, and to the best of my knowledge I believe I told him I had more than eighty-three shares which I was very mortified afterwards to find I had told an untruth. I only had eighty-three shares and I asked Mr. Davis to explain it to him.
Q. Was anything said between you and Mr. Coakley as to what was to be done with this stock?
A. Yes, he told me if I would give him this stock that it would be just as safe in their possession as it was in my box at the Pennsylvania Company, and that he would make me a nice little lot of money. That stocks were going up, and he strongly advised me to put it in their hands and that I could get it at any time, I could have the shares at any time.
Q. Did he say anything about repledging it?
A. No.
Q. Did you say anything about repledging it?
A. I did not know anything at all about it. I did not understand it.
Q. Was anything said about this stock leaving the possession of Jacob Berry & Company?
A. He told me it was just as safe there and I supposed it would be in his possession, or rather in the possession of the firm.

Mr. Levis: I move to strike out what she supposed.
The answer is stricken out by consent.

Q. To whom did you deliver the eighty-three shares?
A. I gave the eighty-three shares to Mr. Davis in Philadelphia and I returned from Philadelphia that day and the next day I gave the shares to Mr. Davis. He was the manager of Berry & Company.

102 Q. Did he give you this receipt? (Handing paper to witness.)

A. He gave me this receipt.

Q. Can you state what was the number of the two certificates which you gave to Mr. Davis?

A. I can now when I look at that.

Q. What were they?

A. Thirty-three shares number A-30563 and fifty shares number C-15546, making eighty-three shares in all.

Q. Did you receive this receipt from Mr. Davis?

A. I did.

Mr. SUMNER: I will offer this receipt in evidence.

The receipt is received in evidence and marked Taggart Exhibit C of this date.

The receipt is as follows:

Q. Did you have any talk with Mr. Davis at that time about the certificates being repledged?

A. I did not. He did not mention it to me.

Q. Or about their leaving the possession of Jacob Berry & Company?

A. No.

Q. For any purpose?

A. No. I took Mr. Coakley's word for granted.

Mr. LEVIS: I move to strike out what she took for granted.

The answer is stricken out by consent.

Q. Did you ever read the small printed matter on this receipt beginning with the words, "The same to be a general deposit," and ending with the words, "Commodities are dealt in"?

A. I did not.

Q. That is until after the failure?

A. After the failure. I accepted the receipt the same as I would for a bill paid or anything of the kind.

103 Mr. LEVIS: I move to strike the statement out as a conclusion in the mind of the witness, and as incompetent.

Q. Had you written your name on the back of these two certificates?

A. I did when I delivered them to Mr. Davis.

Mr. SUMNER: That is all.

Cross-examination by Mr. LEVIS:

Q. Mrs. Taggart, when you had this first conversation with Mr. Coakley did he tell you why he wanted you to deliver eighty-three shares of United States Steel which you had?

A. He simply said if I would give—he asked me if I had stock. I told him I had not any money, and he asked me if I had any stocks and I told him yes. I told him more than eighty-three shares which I was very much mortified at feeling I had told him an untruth, and I apologized for it, and he said that was all right. And he told me

at the time it would be just as safe as if it were in my box at the company and that I could have it at any time and that he would make some money for me.

Q. Did you tell him at that time that you wanted to have some further dealings with Jacob Berry & Company?

A. No. Not particularly. He knew I was dealing, through Mr. Davis.

Q. You told him that you wanted to order some further stock?

A. No, I do not know that I did. I told him that I wanted to make some money.

Q. Didn't you tell him when you said you wanted to make some money that you were going to transact further margin accounts with Jacob Berry & Company?

104 A. I do not know that I did; I am quite sure I did not.

Q. Why did he ask you to deliver any further stock at the time?

A. That is what I cannot understand, I do not know.

Q. Did you ask him at that time how much you had to your credit on the account?

A. No, I did not.

Q. In money?

A. No, because he had not transacted any business for me. This was done in the Philadelphia house.

Q. You were carrying at that time, Mrs. Taggart, a large number of shares on margin, were you not?

A. Not very many. About twenty shares or ten shares at the time of Wabash & Erie and some little stocks. I had given Mr. Davis $100 and he was carrying all those for me. They also carried at that time Wabash. I think he had written me while I was at Atlantic City for money which I sent him. Of course that was $50 and $25.

Q. How did you come to go to see Mr. Coakley on this day?

A. That is the mystery I cannot answer myself. I cannot understand it myself.

Q. You simply walked into the office of Jacob Berry?

A. I simply walked into the office of Jacob Berry, not advised by any one. I do not know why I did it.

Q. Did Mr. Coakley run over your account with you at that time?

A. Not at all. I talked with him outside, a sort of a little place with a counter or something. I did not have five minutes' conversation.

Q. Did you tell Mr. Coakley at that time all the stocks you were carrying on margin?

A. He knew that.

105 Mr. SUMNER: I object to that upon the ground of being improper in form; on the ground that Mrs. Taggart did not know as a matter of fact whether they were carrying any stocks on margin and it has not been shown by the evidence.

The WITNESS: I did not have any conversation with him.

Q. What did you tell Mr. Coakley about your account at that time?

A. I did not tell him anything about my account.

Q. Now these shares of United States Steel and Erie and Atchison which you told him you were carrying, had you paid for these stocks in full?

Mr. SUMNER: I object to that upon the ground that the witness has not told him she was carrying them.

Question withdrawn.

Q. Mrs.Taggart, what stocks was Jacob Berry & Company carrying for you on the first day of November, 1904?

Mr. SUMNER: Objected to upon the ground that Mrs. Taggart has stated that she has no knowledge whether any of the orders that she gave to Jacob Berry & Company were ever executed. She accordingly does not know whether they were carrying any stocks for her or not. Furthermore the account is the best evidence.

The question is repeated as follows:

"Q. Mrs. Taggart, what stocks was Jacob Berry & Company carrying for you on the first day of November, 1904?"

A. Well, I am not sure they were carrying that stock or all those stocks. I do not know they bought them, as the subsequent evidence has shown.

106 Q. You ordered the purchase for you, did you not, thirty shares of Atchison and thirty shares of Erie and thirty shares of United States Steel?

A. Yes, at Mr. Davis's suggestion. He would write me. I had those letters in evidence.

Q. Did you receive from Jacob Berry & Company or from their Philadelphia manager, a bought receipt, did you not, stating these certificates had been bought for you?

A. Yes, those little papers, yes.

Q. And the account which I show you, which has just been offered in evidence, you received from them on or about the first day of November, did you not?

A. When did they fail?

Q. The 26th of November.

A. Yes, this was the last one I received, yes.

Q. Now, the orders which you had given for steel, for Atchison and for Erie had not been paid for at the time of the ordering, had they, if full, and had not been paid for in full?

A. Had not been paid for in full, no. Those had nothing to do, as you will see, with the eighty-three shares.

It is stipulated that Mrs. Taggart gave to Jacob Berry & Company orders for the purchase and sales of stocks stated on the eighth statement of account which has been offered in evidence, and that if said purchases and sale of stocks were actually made by Berry & Company, the balances are correct.

(It is further stipulated that Mrs. Taggart never gave any orders for the purchases of sales of stocks other than those contained in the account, and that none of the securities mentioned in the said account were paid for in full by Mrs. Taggart except the five shares of Erie

which she received and paid in full, and the eighty-three
107 shares of stock of the United States Steel Corporation which she delivered to Jacob Berry & Company on or about September 14th, 1904.)

Q. On September 14th or 15th when you delivered this eighty-three shares of stock to Mr. Davis, did you deliver him any cash at the same time?

A. Oh, no.

Q. When did you deliver him $50 in cash, how long before?

A. Well, it was some time during the summer. I was at Atlantic City. That was long before I put those eighty-three shares, and he would write me and tell me to pay him, to send so much whatever the stocks was. I think it is all stated here, anyway.

Q. I call your attention, Mrs. Taggart, to the statement of account which was offered in evidence, running from the thirty-first day of August to the thirtieth day of September. Does that statement of account that you delivered to Jacob Berry & Company show $50 on the 15th day of September?

A. No, I did not. I can positively and emphatically say I did not in September. I was over in New York and it was about the 13th of September I gave the eighty-three shares. This is the first time I have seen them. I did not pay during the summer months. I did send them some money, I think one time twenty-five and one time fifty dollars, as near as I can remember. This is the first time I have seen this and I do not understand it at all.

Q. Then you deny you gave them $50 in September, 1904?

A. Yes, I don't remember it at all.

Q. You are not sure you did or did not, is that correct?
108 A. No, but I can be sure by looking over my account book, because I would naturally pay that in check.

Q. Now, Mrs. Taggart, go back when you met Mr. Coakley in New York——

A. (Interrupting.) I can tell you what this is now. I recollect it now. I had a check cashed, that is it, I had my check cashed positively a check cashed. This is the first time I have noticed that. I wanted the change.

Q. They cashed the check?

A. They cashed the check.

Q. In New York City or in Philadelphia?

A. New York City at Mr. Coakley's office.

Q. Now, will you look at this statement of account, is there any entry showing cash payments?

A. I do not see why it should be here, but I could send Mr. Sumner my bank book which would show it. I have got a margin that would show it, you know from the check book.

Q. Just when were you in Atlantic City, Mrs. Taggart?

A. I was in Atlantic City from early in May until about the 14th or 15th of July, then I went down to my home in Winchester, Virginia, and stayed there, and then about the 12th or 13th of September I was in New York and went over as near as I can re-

member and saw this Mr. Coakley and had a check cashed. I remember perfectly well having this check cashed.

Q. Was this letter which Mr. Davis sent you asking for more money on your account mailed to you at Atlantic City or while you were in Virginia?

A. At Atlantic City, long before I left those shares there.

Q. You sent a check from Atlantic City, is that correct?

A. Yes, as near as I can remember. It could not have been $50, it might possibly have been $40.

109 Q. You are sure you never sent a check to apply on your account in September to Jacob Berry & Company?

A. I am almost sure; well, now, I could not possibly, because my accounts, you know, was——

Q. (Interrupting.) When you were talking with Mr. Coakley on or about the 14th or 15th of September in the New York office, didn't he tell you that he would require more security for your account?

A. Oh, no; he told me he would make a great deal of money if I would give him these shares. I did not want to lose any money.

Q. Did you tell Mr. Coakley when you were talking with him that you desired to deal in some further margin transactions with Jacob Berry & Company?

A. I did not; I simply went in there and he suggested if I would give him some stock—he asked me what I had and I told him I had steel stock and in fact I made the statement I had more shares and when I found out I had not I was mortified to think I had told an untruth, but Mr. Davis said it was all right.

Q. How did you begin this conversation with Mr. Coakley?

A. I do not know; I cannot tell you that.

Q. What were the words you first spoke to Mr. Coakley before stating to him the fact that you had some steel stocks of your own?

A. Well, of course, when I introduced myself to Mr. Coakley my name was naturally familiar, dealing with Mr. Davis, and then he asked me if I had stocks, that everything was going up now. I told him I had no money. He said, "If you have shares it will just answer." I said I had these steel shares.

Q. And he told you he would use the stocks instead of money, did he?

110 A. I do not know that he used those words. It was the same purpose. He said, "It will be all right, they will be just as safe here as if they were in your bank in Philadelphia." He was so particular about it that he said, "Now have Mr. Davis go down to the bank with you and secure—take the certificates up with him;" that he would accompany me.

Q. When he told you that the stocks was going up did he tell you that he would buy some for you?

A. I took it for granted he did, but he did not buy any for me.

Q. Did he tell you that he would buy some for you?

A. I took it for granted he would buy me some stocks. I took it for granted he would buy stocks.

Q. He told you that?

A. I cannot remember exactly the words he said.

Q. Did he tell you that Mr. Davis would tell you the kind of stocks would be likely to rise?

A. Yes, he suggested it.

Q. And that Mr. Davis would then buy those stocks for you.

A. Mr. Davis would buy them, he would buy them, yes.

Q. He told you they would use those eighty-three shares of steel stocks instead of money?

A. I do not know that he said instead of money; he simply said he would take these shares and they would be just as safe—now I cannot positively state he said instead of money; I cannot say that you know.

Q. Now, that is all you can remember about the conversation with Mr. Coakley?

A. That is all I can remember about the conversation with Mr. Coakley.

Q. When you went to see Mr. Davis after talking to Mr. Coakley did you bring the stocks to Mr. Davis or did Mr. Davis go to the bank?

111 A. He did not; I took them up myself.

Q. You brought them yourself to Mr. Davis?

A. Yes.

Q. And did Mr. Davis make out this receipt marked Taggart, Exhibit C, of this date? (Handing paper to witness.)

A. Mr. Davis gave me this receipt.

Q. Did he make it out in your presence?

A. He wrote it out in my presence, at his desk which was a short distance from me and handed it to me.

Q. And did you look at the receipt, what is written in ink on there?

A. Positively I did not.

Q. When you received the receipt you simply took it and folded it up?

A. I took it and folded it up and put it in my bag.

Q. You did not look at the words on that receipt where it says, "As collateral on account"?

A. I positively did not. I positively am certain I did not.

Q. Did you ever after you got home read the form of that receipt?

A. I positively did not; I put it in my desk and carried it with me.

Q. When you took this receipt out of your pocketbook and put it in the desk did you look at it then?

A. Positively I did not.

Q. Did you examine the receipt to see whether this eighty-three shares were written on it?

A. I took it for granted that my eighty-three shares were written

on it. I took it for granted it was upon it certainly; I knew it was a receipt for my eighty-three shares.

Q. Did you look to see whether your eighty-three shares appear on the face of it?

A. I certainly did that; certainly I saw that. Mr. Davis handed it to me.

112 Q. When you saw that didn't you notice the other ink words, "As collateral on account"?

A. No, I have to admit my absolute ignorance. I must say I did not. I did not know the meaning of the words.

Q. Did you look to see if Mr. Davis had signed the receipt when you got it?

A. I saw his name there, certainly.

Q. You saw his name there?

A. Certainly I did.

Q. Didn't you look at the numbers of the certificates to see whether they were the ones that you delivered?

A. I do not know; I would not say positively that I did. I know I saw my shares, eighty-three shares steel preferred. I took my receipt of course, and I just looked at it that way.

Q. You looked at the signature at the bottom to see if it was signed?

A. I suppose I did. I do not know. I would not say I did positively, for I do not know; I should take it for granted I did; I took the receipt as I have told you and then in my own honesty and sincerity I took this receipt—I cannot tell any more. Of course I am not accustomed to those things.

Q. But you are positive, Mrs. Taggart, that you did not notice the words, "As collateral security on account," written in ink just above the signature of Jacob Berry & Company?

A. I am positive of it. If I did notice it I am ashamed to admit my absolute ignorance and Mr. Sumner of course knows what it is.

Q. When you delivered these stock to Mr. Davis was your signature then on the back of the two stock certificates?

A. I did not put my signature until after he had—I had given him the stock and he witnessed my signature.

113 Q. When you first delivered it was your name on it?

A. No, not at all.

Q. And did he say to you, "Mrs. Taggart, you must put your name on this certificate"?

A. Yes, I signed my name.

Q. What reason did he state to you for putting your name on the back of the certificate?

A. I don't know that he stated any reason. I am almost sure that he did not.

Q. He simply stated to you to put your name on?

A. I took it for granted.

Q. Didn't he tell you why he wanted you to put your name on it?

A. No, he did not.

Q. Didn't you ask him why he wanted you to put your name on there?

A. No, I did not; I am ashamed to say I did not.

Q. You had been dealing in stocks from the previous December, had you not?

A. Yes, a couple of times.

Q. And didn't you know what effect the putting of your name on the back of that slip was?

A. Positively I did not.

Q. Did you read what was immediately above your signature when you wrote your name down on the back of the certificate?

A. I positively did not, I did not know.

Q. Didn't you read it before you signed your name?

A. I did not. I know little or nothing about business. I never did in my life, I did not.

Q. When you first went into the office with the stock to Mr. Davis what did you say to Mr. Davis about delivering these eighty-three shares to him?

A. I did not say anything to him. He knew I had seen Mr. Coakley in New York.

Q. How did he know, did you tell him you had seen Mr. Coakley?

114 A. No, not at all; Mr. Coakley had 'phoned over to him from New York.

Q. Did you hear Mr. Coakley 'phone to Mr. Davis?

A. I did not. He did not 'phone him in my presence. Mr. Davis knew I was coming with the stocks. I did not.

Q. When you deposited the stocks on the counter did you say anything to Mr. Davis at all?

A. I told him I was afraid that I had told Mr. Coakley that I had more stocks and I said, "I am afraid that he will think that I am very untruthful." He said, "Mrs. Taggart, that is all right."

Q. And when Mr. Davis took this eighty-three shares from you did he tell you what he was going to do with it?

A. No, he did not.

Q. He simply said, "Sign your name on the back"?

A. That was all.

Q. And you wrote your name in his presence?

A. I did.

Q. And did he have any further conversation with you?

A. No, he did not.

Q. Did you ask him then to buy some stocks for you?

A. Mr. Davis? No, I did not.

Q. You left immediately after writing your name?

A. I left immediately afterwards.

Q. Did he send you word later that it would make money for you to deal in certain kinds of stocks?

A. Mr. Coakley told me that he wanted me to buy some shares and if I had any stocks I should leave them with him and he told me he would make money for me.

115 Q. Then Mr. Davis did send you word afterwards, after you delivered these certificates to him that you should purchase this or that kind of stock?

A. Mr. Coakley telegraphed me, "Missouri Pacific and Southern Pacific both are going up." I telephoned immediately, "Buy."

Q. You telegraphed "Buy"?

A. No, he telegraphed me, and I said, "Buy, use your own judgment." Then the next day the telegram was received, "State the amount," ten or twenty shares, whatever it was. I wrote, "Twenty shares, so and so and so." That to the best of my knowledge. I had placed my certificates there somewhere about September. That was a few weeks after.

Q. When you signed this telegram, "Buy," in reference to these stocks, you did not send them any money at that time, did you?

A. No.

Q. The next day or so you sent them a telegram, "Buy twenty shares of this or that kind of stock," you did not send them any money then, did you?

A. No.

Q. They did not ask you for any money, did they?

A. No.

Q. Did it seem strange to you that they should buy without putting up any money?

A. This man Coakley told me in, I think, the month before that with this eighty-three shares of stock that I had left with him I would not need to put any money. My stock would be just as safe with them as if it was in my box at the company's office.

Q. Didn't you understand at the time that he was buying on the credit of this certificate or the two certificates of stocks?

A. I am ashamed to say I did not.

Q. You mean you did not deliver any money to him?

116 A. Nothing but this eighty-three shares.

Q. And you intended that he should look to this thirty-three shares if he lost money?

A. I did not think any way at all about it; of course I knew—I took it for granted—he told me he was going to make money on these shares and for me not to worry. I am just as positive he said that those eighty-three shares was just the same with him——

Q. (Interrupting.) Mrs. Taggart, you had been dealing in stocks from December, 1903, up to September, when you delivered the certificates?

A. Yes, I made about a hundred and some odd dollars.

Q. Did you lose any money on those dealings?

A. No, as you can see by these papers.

Q. In all your dealings you had made money?

A. Altogether I made one or two hundred dollars.

Q. On any one specific purchase or sale did you lose money?

A. I did not. I was asked by Mr. Davis to send $50 at one time, I think, and $25 at another time. I am not quite sure about the fifty dollars, it may have been forty.

Q. That $50 which you were asked to send was to cover any losses, wasn't it?

A. Yes; he asked me—he wrote and I think I have got the letter that stocks was going down and I would have to send that much to him to cover.

Q. You know that to deal in stocks you are likely to lose money sometimes, don't you?

A. I know it now.

Q. You did know it then, didn't you, Mrs. Taggart?

A. I took it for granted I would have to run the risk.

117 Q. You intended if he did not make money on the transaction in October, that he should look to the eighty-three shares to recoup himself for his loss, didn't you?

A. No, I did not. I never dreamed of my eighty-three shares being touched at all. I can assure you most positively. In my ignorance I never dreamed of their being touched.

Q. Mrs. Taggart, will you tell me how many shares of stock you ordered from Jacob Berry & Company after you left with Mr. Davis the eighty-three shares of steel, without delivering him any money?

A. As near as I can tell you in answer to the telegram to purchase twenty shares of Missouri Pacific and twenty shares of Southern, whatever it was—three or four stocks. In this telegram that I sent, Mr. Davis made a mistake and bought me an extra amount of the same thing, he gave a little more for it, whether it was Southern or something else——

Q. Will you look and see if it will refresh your mind as to the other certificate, this paper? (Handing paper to witness.)

A. Here they are. They are all here. I do not understand what this cash means. I do not understand it because I did not give them cash. I did not think if I had a check cashed it would be there.

(It is conceded that subsequent to the delivery of the eighty-three shares of steel preferred to Jacob Berry & Company, that Mrs. Taggart, without the payment of any cash, gave orders for the purchase of twenty shares of Cambria Steel, twenty shares of the Baltimore and Ohio, forty shares Pennsylvania, twenty shares United States Steel preferred, twenty shares B, twenty S. P., twenty shares
118 So. and P., twenty Erie and twenty M. O. P., and twenty Atchison.)

Q. Now, Mrs. Taggart, from the time you began dealing with Jacob Berry & Company in December, 1903, to the time of their failure, what cash did you deliver to them?

A. $100 when I first called there, and as near as I can recall, $50 and $25, which I think I received the equivalent of.

Q. And how much cash did they deliver back to you during this year following?

A. As near as I can think, they sent $52.50 and $90, and I think he made me $7, or perhaps more on Wabash. It was December 14th, I think.

Q. What is that $60 item?

A. I can't remember that; I wish I could.

Q. Now, Mrs. Taggart, when you gave these orders, did they send back to you a printed statement showing that they had purchased this stock for you?

A. Oh, yes.

Q. And each time they made a purchase they delivered you one of these bought receipts?

A. Yes, they did; bought and sold receipts.

Q. Have you a copy of one of these bought receipts?

A. I think I have. I wouldn't be surprised; I think I have.

Q. Mrs. Taggart, I show you one of the printed forms of Jacob Berry & Company, known as their bought receipts; did you receive one of these printed forms each time you gave them orders for purchases?

A. I did.

Q. And this is an exact duplicate of the form you received?

A. It is.

119 Mr. Levis asks that the form referred to be spread upon the record.

The form referred to is as follows:

"Jacob Berry & Co., N. Y. Consl'd Stock Exchange.

Member of N. Y. Produce Exchange, Philadelphia Stock Exchange.

Bankers and Brokers, 42 Broadway.

NEW YORK, —— —, 190–.

Philadelphia, Boston, Hartford, Montreal, Springfield, New Haven, Albany, Brooklyn, Quebec, Sorel, Bridgeport.

M. —— ——:

It is understood and agreed that all orders to buy or sell stocks, bonds, securities or commodities are to be executed in accordance with and subject to the rules and customs of the Consolidated and Petroleum Exchange of New York or the Exchange where such transactions are made, and all orders executed by Jacob Berry & Co., are accepted, whether the order be given in writing, orally, or by telegraph or telephone. It is agreed that Jacob Berry & Co. is appointed as agent to receive and deliver stocks, bonds, securities or commodities bought or sold for my account, with power to hypothecate, rehypothecate, pledge and repledge or loan any stocks, bonds, securities or commodities, and to substitute similar stocks, bonds, securities or commodities therefor, and the said Jacob Berry & Co. are authorized upon the approximate exhaustion of margin, without notice to me, to buy or sell as the case may be, any stocks, bonds, securities or commodities held by them for any account as
120 collateral for margin or otherwise, providing such purchases or sales be made upon the Consolidated Stock and Petroleum

Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or upon any other Exchange in the City of New York where such stocks, bonds, securities or commodities are dealt in.

We have this day bought for your account and risk, subject to above conditions:

Amount.	Description.	Price.	Name.

JACOB BERRY & CO.,
Per....."

Q. Mrs. Taggart, I call your attention to the words on that receipt:

"It is understood and agreed that all orders to buy or sell stocks, bonds, securities or commodities are to be executed in accordance with and subject to the rules and customs of the Consolidated Stock and Petroleum Exchange of New York, or the Exchange where such transactions are made, and all orders executed by Jacob Berry & Co. are accepted whether the order be given in writing, orally, or by telegraph or telephone. It is agreed that Jacob Berry & Co. is appointed as agent to receive and deliver, stocks, bonds, securities or commodities bought or sold for my account, with power to hypothecate, rehypothecate, pledge and repledge or loan any of said stocks, bonds, securities or commodities, and to substitute similar stocks, bonds, securities or commodities therefor, and the said Jacob Berry & Co. are authorized upon the exhaustion of margin, without notice to me, to buy or sell as the case may be, and
121 stocks, bonds, securities or commodities held by them for my account as collateral for margin or otherwise, providing such purchases or sales be made upon the Consolidated Stock and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or upon any Stock Exchange in the City of New York where such stocks, bonds, securities or commodities are dealt in."

—. Did you ever read those words on that bought receipt?

A. I did not.

Q. In all of this large number of bought receipts that you got from Jacob Berry & Company, did you never read any of the printed matter on them?

A. I never did.

Q. You never at any time objected to the form of the receipt sent you by Jacob Berry & Company, did you?

A. No.

Q. Did you ever show this receipt to anybody else?

A. I never did.

Q. Did you ever compare this receipt with any other receipt?

A. I never have. I did not speak of my transactions to any of my friends in this concern whatever.

Q. And when you received the sale slips, did you ever read those?

A. I never did.

Q. You never looked at the printed matter on them either?

122 A. Simply glanced over the writing on them.

Q. You read the written matter?

A. Yes.

Q. You found out what stock they had bought for you?
A. Yes.
Q. And the prices?
A. Yes.
Q. But you never looked at the printing just above it?
A. No. I never read it.
Q. Did you know at the time you delivered these two certificates of eighty-three shares to Jacob Berry & Company, that they had a right to pledge your stock for any unpaid marginal balances there might be against you?
A. I did not.
Q. When you signed your name to that certificate, what did you sign it for?
A. Well there was no object in my signing it except just that I expected to make some money. I was stupid. I did not know the importance of it.
Q. You have endorsed checks have you not?
A. I write my own checks always?
Q. And you have endorsed checks, have you not, on the back?
A. On the back, always.
Q. You know what effect the writing of your name on the back of a check is do you not?
A. I am afraid I know now. I don't think I did know previous to this affair.
Q. You had no idea what effect on the writing of your name on the back of these certificates had?
A. I never did. I did not know any more about business than a child of ten years of age. I am ashamed to say it, but I must be candid.

123 Q. Mrs. Taggart, you knew at the time you were making these purchases, did you not, that you would have to pay for the stock that you bought?
A. Mr. Levis, I knew nothing but what Mr. Davis said he could make some money for me, and I unfortunately went into this affair in a very stupid way. I am afraid. I was over anxious.
Q. Mrs. Taggart, when you looked at these bought receipts, you read all the writing on them?
A. Yes, sir.
Q. And you noticed on the outside column that it said the name of the broker from whom Jacob Berry & Company bought it?
A. No I do not know that I can say that. I do not know. I never had anything like that; this slip you have shown me, I have seen the name. I remember one name; it comes back to me; it was on one slip that I got while I was in Winchester.
Q. Did you see any such words as N. Y. S. E. on the margin?
A. I do not know. I have some slip— I remember one name; the name of Allen Reid. I remember the name, I know a gentleman by that name and the thought occurred to me, will my name be on his slip.

By Mr. SUMNER:

Q. Did you ever deliver any stocks or other securities to Jacob Berry & Company except the eighty-three shares of steel preferred stock which you have testified to?

A. I never did.

Q. Did you know that writing your name on the back of the stock certificates which stood in your name, and delivering the certificates to another person gave that person the right to sell it?

A. I did not.

124 It is stipulated by the Trustees that they have in their possession the two certificates of United States Steel preferred stock, one for fifty shares, number C15,546, standing in the name of Anna D. Taggart, and a further certificate of thirty-three shares of number A30563 standing in the name of Anna D. Taggart. These two certificates of stock were deposited in the Hanover National Bank as part of the collateral security delivered for a loan of $45,000, and were restored to the Receiver in Bankruptcy without selling the same, to reimburse themselves for the $45,000 loan.

Mr. SUMNER: The claimant further claims:

Certificate No. B1532 for 20 shares of Erie R. R. stock.

Certificate No. A144899 for 10 shares of Brooklyn Rapid Transit stock.

Certificate No. A15219 for 10 shares of Brooklyn Rapid Transit stock.

Certificate No. 15735 for 20 shares of U. S. Steel preferred stock.

Certificate No. 15712 for 10 shares of U. S. Steel preferred; and

Certificate No. 88726 for 3 shares of U. S. Steel preferred stock.

It is conceded that the claimant gave orders for the purchase of stock corresponding in the number of shares and in kind, but that the claimant has no personal knowledge as to whether any stocks were purchased by Jacob Berry & Company in pursuance of such orders, or if any such stocks were purchased with the certificate numbers of in whose name they stood. That she never requested these stocks to be transferred into her name and never re-

125 quested the delivery of any of these shares of stocks to her.

And it is further stipulated that these stocks were not deposited with Jacob Berry & Company as collateral security for any margin transactions, and if purchased by Jacob Berry & Company were marginal purchases.

It is stipulated that on or about January 30th, 1905, Mrs. Taggart tendered to the Trustees in Bankruptcy the sum of $10,638.69, and demanded the delivery to her by the Trustees of the following securities:

Eighty-three United States Steel Preferred Stock.

Twenty shares United States Steel Preferred Stock.

Twenty shares Brooklyn Rapid Transit Stock.

Forty Southern Pacific Railway Stock.

Twenty Shares Erie Railroad Stock.

Twenty shares Missouri Pacific Stock.

Twenty shares Atchison Railroad Stock.

And that said tender and demand were refused by the Trustees.

Mr. Sumner reserves the right to trace the other securities above mentioned.

It is stipulated by the attorneys for the Trustees that Mr. Coakley and Mr. Davis were both in the employ of Jacob Berry & Company at the time mentioned in the testimony of the witness.

Mr. LEVIS: I move to dismiss the petition and claim of Anna D. Taggart on the ground that no satisfactory identity of the stocks has been shown; on the ground that the stocks deposited was
123 deposited as collateral security for a marginal account, and that such stock is to be regarded as cash and cannot be reclaimed from the Trustees in Bankruptcy herein; and on the further ground that the claimant has not shown facts sufficient to warrant the reclamation of this stock.

I move to dismiss the claim further upon the ground that the delivery of the stock and any subsequent dealings under the form of receipt given, show a waiver on the part of the claimant to any right to recover the stock, and show consent on her part that the stock should be used as cash; and further on the ground that any lien which she may have to such stock had been destroyed by the course of dealings with the bankrupts.

[Testimony on this claim closed.]

(Here follow Exhibits A and B marked p. 127.)

EXHIBITS

NOT

SUITABLE

FOR

MICRO-

FILMING

128 *Claim of Anna D. Taggart.*

Law Offices of Simpson, Thatcher & Bartlett, 25 Broad Street, New York.

APRIL 6, 1905.

Stanley W. Dexter, Esq., Referee, 71 Broadway, City.

DEAR SIR: Pursuant to the order made by Judge Holt in the matter of Jacob Berry & Co., bankrupts, dated March 25, 1905, directing all persons asserting any claim to the surplus securities left in the possession of the Hanover National Bank after payment of its loan to the bankrupts, to file notice of claim with you, we hereby give notice that we, as attorneys for Anna D. Taggart, assert a claim of absolute and unqualified ownership of eighty-three shares of the preferred stock of the United States Steel Corporation, represented by Certificates No. C-15546 for fifty shares, and A-30563 for thirty-three shares, both standing in the name of the said Anna D. Taggart, which stock is included among the securities aforesaid, and is now in the possession of the Trustees.

We expect to receive from you a formal notice of the first hearing in this matter, which we hope will take place on the 18th day of April.

Very truly yours,
SIMPSON, THATCHER & BARTLETT.
S.

129 *Claim of Anna D. Taggart.*

Law Offices of Simpson, Thatcher & Bartlett, 25 Broad Street, New York.

APRIL 18, 1905.

Filed Apri- 18, 1905. Stanley W. Dexter, Referee in Bankruptcy.

Stanley W. Dexter, Esq., Referee, 71 Broadway, N. Y. City.

DEAR SIR: Pursuant to the order made by Judge Holt March 25th, 1905, in the matter of Jacob Berry & Co., bankrupts, requiring all persons making any claim to any of the certificates of stock, or surplus thereof, pledged to the Hanover National Bank by said bankrupts, to file their claims therefor, asserting their right or title thereto, in your office, as Referee in Bankruptcy, we hereby, as attorneys for Anna D. Taggart, in addition to, and subject to the claim heretofore made for 83 shares of the preferred stock of the United States Steel Corporation, by letter to you dated April 6, 1905, make a claim to such of the following described certificates of stock, or the proceeds thereof, as now remain in the possession of the Trustees of said bankrupt, to wit:

Certificate No. B 1532 for twenty shares of Erie R. R. stock.

Certificate No. A 14899 for 10 shares of Brooklyn Rapid Transit stock.

130 Certificate No. A 15219 for 10 shares of Brooklyn Rapid Transit stock.

Certificate No. C 15735 for 20 shares of U. S. Steel preferred stock.

Certificate No. 15712 for ten shares U. S. Steel preferred stock; and

Certificate No. 88726 for 3 shares of U. S. Steel preferred stock.

The right or title which said Anna D. Taggart asserts to the said stock is that they were purchased, and were being carried by said bankrupts for her, and were her property at the time of the failure.

Very truly yours,

SIMPSON, THATCHER & BARTLETT.
S.

EXHIBIT "C."

PHILADELPHIA, PENN.

Received from Anna D. Taggart fifty (50) Steel Preferred No. 15546 and thirty-three (33) Steel Preferred No. 30563. The same to be a general deposit, and this receipt is given and received with the mutual understanding that Jacob Berry & Co. may hold the same as margin and as security for or apply the deposit in part payment of or on account of losses on any or all transactions in the purchase or sale of stocks, bonds, securities or commodities made by them for your account.

This receipt is given and received upon the further understanding and agreement in consideration of Jacob Berry & Co. executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by
131 telegraph or telephone; that the said Jacob Berry & Co. may repledge, rehypothecate or loan any or all of said stocks, bonds, securities or commodities held by them on account thereof as margins or otherwise; may substitute similar stocks, bonds, securities or commodities therefor, and that said Jacob Berry & Co. may, without notice, upon the approximate exhaustion of margins, sell or buy, as the case may be, any stocks, bonds, securities or commodities bought or sold or held by them as collateral, or margin, or otherwise, and that in case of contracts for future delivery that said Jacob Berry & Co. may close the same by purchase or sale, as the case may be, without notice, provided, however, that such purchases or sales be made either upon the Consolidated Stock and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade or in any other Exchange in the City of New York where such stocks, bonds, securities or commodities are dealt in.

(Sgd.) GEORGE M. DAVIS, *Manager.*

No. 15546.
No. 30563.
Written on the face of the receipt in ink are the words:
"Collateral on Account."

132 United States District Court, Southern District of New York.

In the Matter of JACOB BERRY and HAROLD L. BENNET, Individually and as Members of the firm of Jacob Berry & Company, Bankrupts.

It is hereby agreed that in order to obviate the necessity of certifying and printing the entire testimony taken before the Honorable Stanley W. Dexter, as Special Commissioner at the hearing on the claim of William C. Bowers, it is hereby stipulated as follows:

I. That an assignment for the benefit of creditors to Ashbel P. Fitch, Jr., was made by the firm of Jacob Berry & Company on the morning of the 26th day of November, 1904, and that thereafter and on or about the 28th day of December, 1904, a petition in involuntary bankruptcy was filed against Jacob Berry and Harold L. Bennet, individually, and as members of the firm of Jacob Berry & Company, and in the course of the said proceedings, on the 30th day of November, 1904, the said Jacob Berry and Harold L. Bennet and the firm of Jacob Berry & Company were duly adjudicated bankrupt by order of the District Court for the Southern District of New York.

133 II. That thereafter an order was made by the Honorable George C. Holt on the 25th day of March, 1905, referring to the Honorable Stanley W. Dexter, as Special Commissioner, the determination and adjudication upon the rights and claims of certain claimants to certificates of stock, or the surplus thereof, pledged to the Hanover National Bank, and that said Special Commissioner was to report to the United States District Court his determination thereon.

III. That an order was made by the Honorable Stanley W. Dexter, as Referee in Bankruptcy, directing that the claimants who had any claims against any of the stocks so pledged to the Hanover National Bank, or the proceeds thereof, should file with such Referee a statement and claim of the stocks demanded by them, and that the Referee would thereupon hear the proofs offered by the various claimants and by the Trustee in Bankruptcy, and report the matter to the Court.

IV. Pursuant to the said order of the Honorable Stanley W. Dexter, William C. Bowers filed a motion of appearance by attorney in the office of the Referee, and claimed to be entitled to the immediate possession of two (2) shares of the New York, New Haven & Hartford R. R. Co. stock, a copy of which notice of appearance and claim is hereto annexed and marked Exhibit A.

V. William C. Bowers was the owner of certificate No. 64640 for (2) shares of the capital stock of New York, New Haven & Hartford R. R. Co. prior to the 27th day of October, 1904. On or about the 22d day of October, 1904, he requested the New Haven manager of Jacob Berry & Company to purchase fifty (50) shares of Ontario & Western stock; this was purchased for the claimant, and a

134 bought notice was delivered to Mr. Bowers shortly after the purchase. The form of the bought notice is hereto annexed and marked Exhibit B. At the time of the order for the purchase,

Mr. Bowers had no money on deposit with Jacob Berry & Company nor any certificate as collateral security; the stock was purchased on a margin to be supplied later. On the 27th day of October, 1904, Mr. Bowers delivered to the bankrupts a certificate for two (2) shares of New York, New Haven & Hartford R. R. Company stock and $150.00, and received two receipts, copies of which are hereto annexed and marked Exhibit C and Exhibit D. Mr. Bowers made no objection to the form of receipt presented to him, and the account was carried without any further deposit of money or any further purchase up to the time of the failure. The fifty shares of the Ontario and Western stock were never received by Mr. Bowers.

On the 25th day of November, 1904, when the bankrupt brokers carried fifty shares of Ontario & Western stock relying upon the $150.00 and the certificate for two shares of New York, New Haven & Hartford R. R. Company stock as collateral margin, they pledged the certificate for two shares of New York, New Haven & Hartford R. R. Company stock, No. 64640, to the Hanover National Bank as part collateral security for a loan of $45,000.00. On November 26, 1904, subsequent to the filing of an assignment for the benefit of creditors, the Hanover National Bank sold out certificates held as collateral security for this loan, and paid over to the Trustees in Bankruptcy a surplus remaining after the sale and certain certificates; among the certificates thus turned over is a certificate for two shares of New York, New Haven & Hartford R. R. Company stock, No. 64640, standing in the name of William C. Bowers.

135 When the account of Mr. Bowers was closed out on the books of the bankrupt company as of the day of the failure, the 26th day of November, 1904, Mr. Bowers was credited for the stock carried at that time marginally, at its market value. He is not indebted to the bankrupt estate.

VI. The Honorable Stanley W. Dexter, as Special Commissioner, made his report finding that the Trustees in Bankruptcy should turn over to William C. Bowers, the certificate for two (2) shares of New York, New Haven & Hartford R. R. Company stock, together with costs. The finding of the said Special Commissioner was confirmed by the order of the Honorable George C. Holt, United States District Judge, and this petition for review is taken from the said order of the Honorable George C. Holt, dated October 23, 1905.

VII. That this stipulation shall be filed in the office of the Clerk of the United States District Court for the Southern District of New York, and shall constitute a part of the record upon the petition for review, and be certified and printed therewith with the same force and effect as if the testimony given on the hearing upon the claim of William C. Bowers had been printed in full.

Dated, New York, December 29, 1905.

JAMES, SCHELL & ELKUS,
Attorneys for Trustees.
SAMUEL BITTERMAN,
Attorneys for William C. Bowers.

136 EXHIBIT "A."

District Court of the United States for the Southern District of New York.

In the Matter of JACOB BERRY & COMPANY, Bankrupts.

SIRS: Please take notice that William C. Bowers is the owner and claims the immediate possession of two shares of stock of the New York, New Haven and Hartford Railroad Company, certificates No. 64640, and which was deposited by the above bankrupts with the Hanover National Bank, and you will further take notice that I am retained for the said William C. Bowers in this proceeding, and demand that all papers be served on me at my office No. 280 Broadway, New York City.

Dated, New York, May 1, 1905.

Yours, etc. SAMUEL BITTERMAN,
Attorney for William C. Bowers.

Office and Post Office address, 280 Broadway, Manhattan Borough, New York City.

To Thomas Alexander, Esq., Clerk of the U. S. District Court.
To Messrs. James, Schell & Elkus, Attorneys for Trustees.

137 EXHIBIT "B."

Form of Bought Notice.

Jacob Berry & Co., N. Y. Cons'l'd Stock Exchange.

Members of: N. Y. Produce Exchange, Philadelphia Stock Exchange.

Bankers and Brokers, 42 Broadway.

NEW YORK, ——, 190–.

Philadelphia, Boston, Hartford, Montreal, Springfield, New Haven, Albany, Brooklyn, Quebec, Sorel, Bridgeport.

M —— ——

It is understood and agreed that all orders to buy or sell stocks, bonds, securities or commodities are to be executed in accordance with and subject to the rules and customs of the Consolidated Stock and Petroleum Exchange of New York, or the Exchange where such transactions are made, and all orders executed by Jacob Berry & Co. are accepted whether the order be given in writing, orally, or by telegraph or telephone. It is agreed that Jacob Berry & Co. is appointed as agent to receive and deliver stocks, bonds, securities or

commodities bought or sold for my account, as collateral or otherwise, with power to hypothecate, rehypothecate, pledge, and repledge and to substitute similar stocks, bonds, securities or commodities therefor, and the said Jacob Berry & Co. are authorized upon the approximate exhaustion of margin, without notice to me, to buy or sell as the case may be, any stocks, bonds, securities or commodities held by them for my account as collateral or otherwise, providing
138 such purchases or sales be made upon the Consolidated Stock and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or upon any other Exchange in the City of New York where such stocks, bonds, securities or commodities are dealt in.

We have this day bought for your account and risk subject to above conditions:

Amount.	Description.	Price.	Name.

JACOB BERRY & CO.,
Per ——— ———.

EXHIBIT "C."

BRIDGEPORT, CONN., *Oct. 27th,* 1904.

Received of W. C. Bowers,
Certificate, 2 shares, No. 64640, New York, New Haven & Hartford R. R. Stock, deposited as collateral and to be used in taking up any stock purchased, the $150.00 cash deposit to be included.

JACOB BERRY & CO.
E. W. DUNNING, *Mgr.*

2 shares N. Y. N. H. & H. R. R. stock.

EXHIBIT "D."

BRIDGEPORT, CONN., *Oct. 27th,* 1904.

Received from W. C. Bowers, One Hundred and Fifty Dollars ($150.00) the same to be a general deposit, and this receipt
139 is given and received with the mutual understanding that Jacob Berry & Co. may hold the same as margin and as security for or apply the deposit in part payment of or on account of losses on any or all transactions in the purchase or sale of stocks, bonds, securities or commodities made by them for your account.

This receipt if given and received upon the further understanding and agreement in consideration of Jacob Berry & Co. executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone; that the said Jacob Berry & Co. may repledge, rehypothecate or loan any or all of said stocks, bonds, securities or commodities therefor, and that said Jacob Berry & Co. may, without notice,

upon the approximate exhaustion of margins, sell or buy, as the case may be, any stocks, bonds, securities or commodities bought or sold or held by them as collateral, or margin, or otherwise, and that in case of contracts for future delivery that said Jacob Berry & Co. may close the same by purchase or sale, as the case may be, without notice, provided, however, that such purchase or sales be made either upon the Consolidated Stock and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or in any other Exchange in the City of New York where such stocks, bonds, securities or commodities are dealt in.

(S'g'd) JACOB BERRY & CO.
E. W. DUNNING, *Mgr.*

$150.00.

140 United States District Court, Southern District of New York.

In the Matter of JACOB BERRY and HAROLD L. BENNETT, Individually and as Members of the Firm of Jacob Berry & Company, Bankrupts.

It is hereby agreed that, in order to obviate the necessity of certifying and printing the entire testimony taken before the Honorable Stanley W. Dexter, as Special Commissioner, at the hearing on the claim of George Donaldson, it is hereby stipulated as follows:

I. That an assignment for the benefit of creditors to Ashbel P. Fitch, Jr., was made by the firm of Jacob Berry & Company on the morning of the 26th day of November, 1904, and that thereafter and on or about the 28th day of December, 1904, a petition in involuntary bankruptcy was filed against Jacob Berry and Harold L. Bennett individually and as members of the firm of Jacob Berry & Company, and in the course of the said proceedings on the 30th day of November, 1904, the said Jacob Berry and Harold L. Bennett and the firm of Jacob Berry & Company were duly adjudicated bankrupt by order of the District Court for the Southern District of New York.

141 II. That thereafter an order was made by the Honorable George C. Holt, on the 25th day of March, 1905, referring to the Honorable Stanley W. Dexter, as Special Commissioner, the determination and adjudication upon the rights and claims of certain claimants to certificates of stock, or the surplus thereof, pledged to the Hanover National Bank, and that said Special Commissioner was to report to the United States District Court his determination thereon.

III. That an order was made by the Honorable Stanley W. Dexter, as Referee in Bankruptcy, directing that the claimants who had any claims against any of the stocks so pledged to the Hanover National Bank, or the proceeds thereof, should file with such Referee a statement and claim of the stocks demanded by them, and that the Referee would thereupon hear the proofs offered by the various claimants and by the Trustee in Bankruptcy and report the matter to the Court.

IV. That, pursuant to the said order of Honorable Stanley W. Dexter, George Donaldson filed a verified claim in the office of the Referee, a copy of which claim is hereto annexed and marked "Exhibit A."

V. George Donaldson of New York City was the owner of certificate No. C 88726 for three (3) shares of the preferred stock of the United States Steel Corporation prior to the 31st day of October, 1904. About this time, he delivered the certificate to Samuel T. Morrow, with a power of attorney duly endorsed in blank, to deliver to Jacob Berry & Company, in order that Donaldson might deal in stocks, using this as collateral. Morrow was given a power of attorney by Donaldson, permitting him to trade as Morrow might see fit for Donaldson. Morrow had formerly been manager for
142 the brokerage office of John McCrea & Company, and he took the said certificate of stock to Jacob Berry & Company and delivered the said certificate to James E. Coakley, the manager of the bankrupt firm. He stated to Mr. Coakley that he desired to open a margin account, and to deposit the certificate for three shares of steel preferred as collateral security for this account. No cash was deposited at the time, nor was any cash ever given to Jacob Berry & Company by either Donaldson or his agent, Morrow, or demanded of either of them. At the time of the deposit of the certificate, no receipt was given to Morrow, and the understanding between Morrow and the bankrupts' manager was that Morrow was to open a margin account with Jacob Berry & Company on behalf of Donaldson, using the certificate deposited as collateral security. All the transactions had with the bankrupts were carried through by the agent, Morrow. He thoroughly understood general brokerage rules governing marginal transactions and intended to be governed by them. He ordered the purchase on behalf of Donaldson of ten (10) shares of Rock Island stock and ten (10) shares of Mexican Central stock marginally, and there was drawn out in profits on these transactions the sum of fifty-one dollars ($51) by Morrow. The bankrupt firm, upon receipt of the order for the purchase of the Rock Island and the Mexican Central stock, sent to Donaldson a bought notice, a copy of which is hereto annexed and marked "Exhibit B." Donaldson is not certain whether he read this bought notice and its conditions.

On the morning of the 25th day of November, 1905, while the bankrupts were carrying marginally ten (10) shares of Rock Island Railroad stock, the bankrupt firm pledged the certificate for three (3) shares of the preferred stock of the United States Steel
143 Corporation (Certificate No. C 88726) to the Hanover National Bank as part of the collateral security given for a loan of forty-five thousand dollars ($45,000).

On the 26th day of November, 1904, subsequent to the filing of the assignment for the benefit of creditors, in accordance with the terms of the contract made between the said bank and the bankrupt firm, this certificate of stock was sold out by the bank in partial reimbursement of the said loan. At the time of the said sale, this certificate realized the sum of two hundred and eighty-three and

87/100 dollars ($283.87) to apply on the loan of forty-five thousand dollars ($45,000). The certificate itself did not come into the hands of the Trustees in Bankruptcy. The claimant asserts a lien on the funds returned from the bank to the amount of two hundred and eighty-three and 87/100 dollars ($283.87), representing the proceeds of his stock. When the account of Donaldson was closed out on the books of the bankrupt company as of the date of the failure, the 26th day of November, 1904, giving Donaldson credit for the securities carried at that time marginally at their market value, the bankrupt estate owed him twenty dollars ($20), in addition to these three (3) shares of steel preferred stock which Donaldson claims in this proceeding.

V. The Honorable Stanley W. Dexter as Special Commissioner made his report, finding that the Trustees in Bankruptcy should turn over to George E. Donaldson the sum of two hundred and eighty-three and 87/100 dollars ($283.87) with interest and costs and that the said Donaldson had a lien on the funds returned by the Hanover National Bank to this amount, as representing the certificate of three (3) shares of the preferred stock of the United States Steel Corporation, as stated above. The finding of the Special Commissioner was confirmed by the order of the Honorable
144 George C. Holt, United States District Judge, and this petition for review is taken from the said order of the Honorable George C. Holt, dated October 23, 1905.

VII. That this stipulation shall be filed in the office of the Clerk of the United States District Court for the Southern District of New York, and shall constitute a part of the record upon the petition for review, and be certified and printed therewith with the same force and effect as if the testimony given on the hearing upon the claim of George Donaldson had been printed in full.

Dated, New York, December 12, 1905.

JAMES, SCHELL & ELKUS,
Attorneys for Trustees.

E. T. CHAPPELL,
Attorney for George Donaldson.

"EXHIBIT A."

United States District Court, Southern District of New York.

In the Matter of JACOB BERRY and HAROLD L. BENNETT, Individually and as Members of the Firm of Jacob Berry & Company, Bankrupts.

COUNTY OF NEW YORK, *ss:*

George Donaldson, being duly sworn, deposes and says that he resides at No. 50 Morningside Avenue, Borough of Man-
145 hattan, County of New York, in the said District of New York. That on or about the 3rd day of November, 1904, deponent deposited with the said Jacob Berry and Harold L. Bennett,

of the firm of Jacob Berry & Company, a certain certificate, No. 88,726, for three shares of preferred stock of the United States Steel Corporation, which was to be held by said Jacob Berry & Company as collateral security for stock transactions had by deponent through said Jacob Berry & Company.

That on or about the 25th day of November, 1904, the said Jacob Berry & Co. pledged said certificate of stock with the Hanover National Bank without the consent of or notice to deponent.

Deponent further says that he is not indebted to said Jacob Berry & Co. in any amount and never was indebted to them in any sum whatsoever, and that the said certificate of stock is his own property, and he has always been and now is entitled to the immediate possession thereof against all persons.

Therefore deponent demands the immediate possession of said certificate No. 88,726 for three shares of Preferred Stock of the United States Steel Corporation.

(S'g'd) GEORGE DONALDSON.

Subscribed to and sworn to before me this 17th day of April, 1905.

ROBERT N. WOOD,
Notary Public, New York County.

E. T. Chappell, Attorney for Claimant, 335 Broadway, Manhattan, New York City.

146 "EXHIBIT B."

Form of Bought Notice.

Jacob Berry & Co., N. Y. Consolidated Stock Exchange.

Members of N. Y. Produce Exchange. Philadelphia Stock Exchange.

Bankers and Brokers, 42 Broadway,

NEW YORK, ——, 190–.

Philadelphia, Boston, Hartford, Montreal, Springfield, New Haven, Albany, Brooklyn, Quebec, Sorel, Bridgeport.

M—— ——.

It is understood and agreed that all orders to buy or sell stock, bonds, securities or commodities are to be executed in accordance with and subject to the rules and customs of the Consolidated Stock and Petroleum Exchange of New York, or the Exchange where such transactions are made, and all orders executed by Jacob Berry & Co. are accepted whether the order be given in writing, orally, or by telegraph or telephone. It is agreed that Jacob Berry & Co. is appointed an agent to receive and deliver stocks, bonds, securities or commodities bought or sold for my account, as collateral or other-

wise, with power to hypothecate, rehypothecate, pledge and repledge, and to substitute similar stocks, bonds, securities or commodities therefor, and the said Jacob Berry & Co. are authorized upon the approximate exhaustion of margin, without notice to me, to buy or sell, as the case may be, any stocks, bonds, securities or commodities held by them for my account as collateral for margin or otherwise, providing such purchases or sales be made upon the Consolidated Stock and Petroleum Exchange of New York, the
147 New York Stock Exchange, the Chicago Board of Trade, or upon any other Exchange in the City of New York, where such stocks, bonds, securities or commodities are dealt in.

We have this day bought for your account and risk, subject to above conditions:

Amount.	Description.	Price.	Name.

JACOB BERRY & CO.
Per —— ——.

(Endorsed).—Agreed statement of facts (George E. Donaldson). Filed January 6th, 1906.

United States District Court, Southern District of New York.

In the Matter of JACOB BERRY and HOWARD L. BENNET-, Individually and as Members of the Firm of Jacob Berry & Company, Bankrupts.

It is hereby agreed that in order to obviate the necessity of certifying and printing the entire testimony taken before the Honorable Stanley W. Dexter, as Special Commissioner, at the hearing
148 on the claim of George E. Hall, it is hereby stipulated as follows:

I. That an assignment for the benefit of creditors to Ashbel P. Fitch, Jr., was made by the firm of Jacob Berry & Company on the morning of the 26th day of November, 1904, and that thereafter, and on or about the 28th day of December, 1904, a petition in involuntary bankruptcy was filed against Jacob Berry and Harold L. Bennett, individually and as members of the firm of Jacob Berry & Company, and in the course of said proceedings, on the 30th day of November, 1904, the said Jacob Berry and Harold L. Bennet- and the firm of Jacob Berry & Company, were duly adjudicated bankrupt by order of the District Court for the Southern District of New York.

II. That thereafter an order was made by the Honorable George C. Holt, on the 25th day of March, 1905, referring to the Honorable Stanley W. Dexter, as Special Commissioner, the determination and adjudication upon the rights and claims of certain claimants to certificates of stock, or the surplus thereof, pledged to the Hanover National Bank, and that the said Special Commissioner was *the* report to the United States District Court his determination thereon.

III. That an order was made by the Honorable Stanley W. Dexter, as Referee in Bankruptcy, directing that the claimants who had any claims against any of the stocks so pledged to the Hanover National Bank, or the proceeds thereof, should file with such referee a statement and claim of the stocks demanded by them, and that the Referee would thereupon hear the proofs offered by the various claimants and by the Trustee in Bankruptcy, and report the matter to the Court.

149 IV. That pursuant to the said order of Honorable Stanley W. Dexter, George E. Hall filed a claim in the Office of the Referee, a copy of which claim is hereto annexed and marked "Exhibit A."

V. George E. Hall, of New Haven, Connecticut, was the owner of certificate No. A47114, for ten (10) shares of capital stock of the United States Steel Corporation prior to the 1st day of November, 1904. On that day he went to the New Haven office of Jacob Berry & Company and deposited that certificate along with thirty (30) shares of the common stock of the American Ice Company and ten (10) further shares of the United States Steel Corporation common stock, as collateral security for his marginal account with Jacob Berry & Company.

At the time of the deposit of this certificate, Mr. Hall received a receipt, copy of which is hereto annexed and marked "Exhibit B." No cash was delivered to Jacob Berry & Company or their New Haven agent; the certificate itself, as the claimant testifies, was delivered to Jacob Berry & Company because "I had that margin account with them, and was carrying the ordinary margin account, and I placed the certificate of stock as collateral for any indebtedness that I might owe them at any time, instead of putting cash into their hands for margin." On the same day the claimant ordered the purchase of fifty shares of American Ice Company stock on a margin, without delivering any cash in payment. After the assignment before mentioned the claimant received a "bought notice" stating that Jacob Berry & Company had purchased this fifty (50) shares of ice stock for him. The form of the "bought notice" received is hereto annexed and marked "Exhibit C."

This was not the first dealing which Mr. Hall had with Jacob Berry & Company; on the 17th day of October, he had de-

150 posited a certificate of fifty (50) shares of common stock of the American Ice Company, and had ordered, relying upon this certificate as collateral, without the deposit of any cash, the purchase of one hundred (100) shares of Texas Pacific stock. This stock was purchased by Berry & Company on the 31st day of October, and the claimant received that day a "bought receipt," as follows: "Bought October 31st, 100 Texas Pacific, thirty-five and a half, George E. Hall, Jacob Berry & Company." Thereafter, but before the assignment, he received a "bought notice" similar in form and conditions to "Exhibit C." The claimant does not remember that he ever read the printed form of this notice; he, however, never made any objection to the terms in the "bought notice."

The claimant testifies that he asked Batsford, the New Haven

manager, to "keep the stock (referring to the stock sought to be reclaimed) in New Haven, as a condition that I wanted to take up the stock that he had bought, and was then making arrangements to do so. He said he could not do it, but would have to send it to New York, where they would keep it in the New York office."

At the time of the deposit of the certificate, the claimant did not endorse the certificate, but executed to Jacob Berry & Company a blank power of attorney, of which "Exhibit D" annexed hereto is a copy.

On the morning of the 25th day of November, 1904, while the bankrupts were carrying marginally fifty (50) shares of the capital stock of the American Ice Company, one hundred shares (100) of the Texas Pacific Railway, and one hundred (100) shares of the Chicago & Great Western Railroad stock, for which the claimant had not paid, and as security for which account the certificate sought to be reclaimed stood as collateral, together with eighty (80)
151 shares of capital stock of the Ice Corporation and ten (10) shares of the capital stock of the United States Steel Corporation, the bankrupt firm pledged, or attempted to pledge, the ten (10) shares of the capital stock of the United States Steel Corporation, certificate No. A47114, to the Hanover National Bank, as part of the collateral security given for a loan of $45,000.00 obtained by the bankrupts.

On the 26th day of November, 1904, subsequent to the filing of the assignment for the benefit of creditors, the Hanover National Bank sold certain of the certificates deposited with them as collateral security for the loan and reimbursed themselves out of the proceeds of the sale of these certificates, and turned over to the Trustee in Bankruptcy certain unsold certificates, among which was the certificate for ten (10) shares of the capital stock of the United States Steel Corporation No. A47114, standing in the name of George E. Hall, and the certificate is at present in the hands of the Trustees in Bankruptcy. The claimant seeks to obtain possession of this certificate. When the account of Hall was closed out on the books of the bankrupt Company as of the date of the failure, the 26th day of November, giving Hall credit for the securities carried at that time marginally at their market value, he was not indebted to the estate, but the estate owed him Two Hundred and Seventy-five Dollars ($275.00) over and above all the stock he had deposited as collateral, including the shares of Steel sought to be reclaimed in this proceeding.

Subsequent to the filing of the petition in bankruptcy, a first meeting of creditors was held for the election of Trustee on the 19th day of December, 1904, and George E. Hall filed proof of claim to the amount of Eighteen Hundred and Seventy-five Dollars ($1,875.00), said claim including the value of the certificate
152 of stock sought to be reclaimed in this proceeding. The copy of the said proof of claim so filed, is hereto annexed and marked "Exhibit E."

At the first meeting of creditors, on the 19th day of December, the Referee announced that there would be merely a filing of the

claims and an informal ballot for the purpose of obtaining an expression of opinion, not to be counted for the election of Trustee, and that a short adjournment would be taken for the purpose of examination of claims, and that the formal election of Trustee would occur on the 21st day of December. On the 19th day of December, 1904, at this informal meeting, Mr. George E. Hall filed his claim and voted this claim for Trustee for Ashbel P. Fitch, Jr., the contest for such Trustee being between Ashbel P. Fitch, Jr., and Edward S. Thomas; on the 21st day of December, 1904, at the formal election, George E. Hall did not vote his claim for either candidate for Trustee. The said claim has remained on file in the office of the Referee ever since the date of the filing on December 19th, 1904; no motion has been made, and at the hearing of his claim he made no offer to withdraw this proof of claim or to reduce it, deducting therefrom the value of the ten (10) shares of Steel which he was seeking to recover in the reclamation proceeding.

VII. The Honorable Stanley W. Dexter, as Special Commissioner, made his report, finding that the Trustees in Bankruptcy should turn over to George E. Hall the certificate of the ten (10) shares of the capital stock of the United States Steel Corporation No. A47114 in their possession, and pay the costs of the proceeding to the claimant. The finding of the Special Commissioner was confirmed by order of the Honorable George E. Holt, United States District
153 Judge, and this petition for review is taken from the said order of the Honorable George C. Holt, dated October 23rd, 1905.

VIII. That this stipulation shall be filed in the Office of the Clerk of the United States District Court for the Southern District of New York, and shall constitute a part of the Record upon the petition for review, and be certified and printed therewith with the same force and effect as if the testimony given on the hearing upon the claim of George E. Hall had been printed in full.

Dated, New York, January 4th, 1906.

ALBERT W. PUTNAM,
Att'y for Geo. E. Hall.
JAMES, SCHELL & ELKUS,
Att'ys for Trustees.

"EXHIBIT A."

United States District Court, Southern District of New York.

In the Matter of JACOB BERRY and HAROLD L. BENNET, Individually and as Members of the Firm of Jacob Berry & Company, Bankrupt.

Claim of George E. Hall.

Please take notice that pursuant to an order of Mr. Justice Holt, entered herein, directing that all claims to any certificate
154 of stock in the hands of the Trustee in Bankruptcy herein, which were pledged to the Hanover National Bank by Jacob

Berry & Company, or to the proceeds of said certificates, be filed in the office of Honorable Stanley W. Dexter, Referee in Bankruptcy, Number 71 Broadway, New York City, on or before April 18th, 1905.

George E. Hall, New Haven, Connecticut, hereby files his claim to certificate number A47114 for ten shares of the common capital stock of the United States Steel Corporation. This certificate of stock, and the stock represented by it, is the personal property of said George E. Hall. The certificate of stock was delivered to Jacob Berry & Company solely by way of a pledge as security for the payment of said Hall's accounts with said Berry & Company. The title to the said certificate never passed out of said Hall and any and all claims or liens against the said certificate have been paid and satisfied, and the said certificate should be returned to the said George E. Hall.

ALBERT W. PUTNAM,
Attorney for George E. Hall, 32 Liberty Street, New York.

"EXHIBIT B."

JACOB BERRY & COMPANY,
NEW YORK, *Nov. 1st*, 1904.

Received of George E. Hall, certificate No. 7350-D Twenty Ice Common. 7215 D 10 Ice Common. F-38401 and A-47114 Ten each, United States Steel Common. Held as collateral.
$——.

JACOB BERRY & COMPANY,
R. B. BATSFORD, *Manager.*

155 "EXHIBIT C."

Jacob Berry & Co.

Members of: N. Y. Consolidated Stock Exchange, N. Y. Produce Exchange, Philadelphia Stock Exchange.

Bankers and Brokers, 42 Broadway.

NEW YORK, —— —, 190-.

Philadelphia, Boston, Hartford, Montreal, Springfield, New Haven, Albany, Brooklyn, Quebec, Sorel, Bridgeport.

M- —— ——.

It is understood and agreed that all orders to buy or sell stocks, bonds, securities or commodities are to be executed in accordance with and subject to the rules and customs of the Consolidated Stock and Petroleum Exchange of New York, or the Exchange where such transactions are made, and all orders executed by Jacob Berry & Co. are accepted whether the order be given in writing, orally, or by telegraph or telephone. It is agreed that Jacob Berry & Co. is ap-

pointed as agent to receive and deliver stocks, bonds, securities or commodities bought or sold for my account, with power to hypothecate, rehypothecate, pledge or repledge or loan any of said stocks, bonds, securities or commodities therefor, and to substitute similar certificates, and the said Jacob Berry & Co. are authorized upon the approximate exhaustion of margin, without notice to me, to buy or sell, as the case may be, any stocks, bonds, securities or commodities held by them for my account as collateral for margin or otherwise, providing such purchases or sales be made upon the Consolidated and Petroleum Exchange of New York, the New York Stock
156 Exchange, the Chicago Board of trade, or upon any other Exchange in the City of New York, where such stocks, bonds, securities or commodities are dealt in.

We have this day bought for your account and risk, subject to above conditions.

Amount.	Description.	Price.	Name.

JACOB BERRY & CO.,
Per —— ——.

EXHIBIT "D."

Power of Attorney to Transfer Stock Sold by Curtis & Bradley, 16 Centre Street, New Haven.

Know all men by these presents:

That I, G. E. Hall, do hereby constitute and appoint Jacob Berry & Company to be my true and lawful attorney, for me and in my name and behalf to sell, assign and transfer to —— —— the whole or any part of ten shares in the capital stock of the United States Steel Corporation Common, and for that purpose to make and execute all necessary acts of assignment and transfer.

In witness whereof, I have hereunto set my hand and seal this 4th day of November, 1904.

G. E. HALL. [L. S.]
JACOB BERRY & CO.

Signed, sealed and delivered in the presence of, &c.:
R. B. BATSFORD.

157 EXHIBIT "E."

In the District Court of the United States for the Southern District of New York.

In the Matter of JACOB BERRY and HAROLD L. *L.* BENNETT, Individually and Composing the firm of Jacob Berry & Company, Bankrupt. In Bankruptcy.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

At New Haven, in the District of Connecticut, on the 10th day of December, A. D. 1904, came George E. Hall, of No. 414 Exchange Building, New Haven, in the County of New Haven, State of Connecticut, in said District of Connecticut, and made oath, and says: That the said Jacob Berry and Harold L. Bennet, individually and as composing the firm of Jacob Berry & Company, the persons by whom a petition for adjudication of bankruptcy has been filed, were at and before the filing of said petition and still are justly and truly indebted by said deponent in the sum of eighteen hundred and seventy-five dollars; that the consideration of said debt is as follows:

On or about the 17th day of October, 1904, deponent deposited with the bankrupts, certificate No. 5329 D for fifty
158 (50) shares of the capital stock of the American Ice Company, and on or about the 1st day of November, 1904, deponent deposited with the bankrupts certificate No. 7350D for twenty (20) shares of the common capital stock of the American Ice Company certificate No. 7215D for ten (10) shares of the common capital stock of the American Ice Company and certificate No. F38401 and 47114 for ten (10) shares each of the common capital stock of the United States Steel Corporation. All of the aforesaid certificates were issued in the name of George E. Hall, and were and are the property of the deponent; that said certificates were deposited with the said bankrupts as security for any indebtedness due the said bankrupts; that upon the day the said bankrupts were adjudicated bankrupts, the said certificates were worth the sum of sixteen hundred dollars ($1,600.00), and upon the said last-mentioned day, the said bankrupts were indebted to the deponent in the sum of two hundred and seventy-five dollars ($275.00) for moneys received for and on account of the deponent; that said bankrupts had from time to time, prior to their bankruptcy, purchased for the deponent certain shares of stock upon the Consolidated Stock Exchange, and that upon the day of their adjudication in bankruptcy, said stocks were sold, and the price received therefor by said bankrupts for the account of said deponent exceeded the amount paid for the same by said deponent by the sum of two hundred and seventy-five dollars ($275.00), said deponent hereby stipulates that by filing a notice of this claim he does

not waive any right of action that he now has to recover possession of said certificates, or the value thereof, against either of the bankrupts, or any person in whose possession they may be found, or any right of action that he has against either or both of said bankrupts for the conversion of said certificates to their own use,
159 when said bankrupts knew that said certificates were not their property and never had been; and that the said deponent does not waive any right whatsoever of any kind, nature or description ag-inst the said bankrupts, or either of them, for or on account of the failure of the bankrupts or either of them to return said certificates to said deponent, and for the unlawful hypothecation and conversion of the same by said bankrupts or either of them, and that no note has been received for the said debt, nor any judgment rendered thereon except as aforesaid; that no part of said debt has been paid although duly demanded; that there are no setoffs or counterclaims to the same; that deponent has not, nor has any person by his order or to his knowledge or belief, for his use, had or received any manner of security for said debt whatsoever.

GEORGE E. HALL, *Creditor.*

Subscribed and sworn to before me this — day of December, 1904.

RICHARD H. TYNER,
[SEAL.] *Notary Public.*

(Endorsed)—Agreed Statement of Facts.—Claim of George E. Hall.—Filed Jany. 6/06.

160 District Court of the United States for the Southern District of New York.

In Bankruptcy.

In the Matter of JACOB BERRY & Co., Bankrupt.

NEW YORK, *July 20th,* 1905—2 p. m.

Adjourned hearing on reclamation—Hanover National Bank.

Before Stanley W. Dexter, Esq., Special Commissioner.

Present:

Mr. Sweezey, Attorney for Claimant. Messrs. Kurzmann & Frankenheimer, Attorneys for a Claimant.

Albert W. Putnam, Esq., Attorneys — George E. Hall, a Claimant.

Messrs. Simpson, Thacher & Bartlett, Attorneys for Anna D. Taggart, a Claimant.

E. T. Chappell, Esq., Attorney for George Donaldson, a Claimant.

Messrs. Weeds, Conway & Cotter, Attorneys for John M. Davies, a Claimant.

Messrs. James, Schell & Elkus (by Mr. Levis), Attorneys for the Trustees.

Mr. LEVIS: In reference to the claim of George E. Hall I
161 offer in evidence the proof of claim filed in this proceeding on the 19th day of December, 1904, to the amount of $1,850, said claim being to a certificate of stock sought to be reclaimed in this proceeding.

Mr. PUTNAM: I object.

The paper was marked Trustees' Exhibit "A" of this date.

Mr. LEVIS: In reference to the claim of William C. Bowers I offer in evidence, as stipulated and agreed at a hearing in this case, the receipt of William C. Bowers for the delivery of two shares of New York, New Haven & Hartford Railroad Company stock.

The paper was marked Trustees' Exhibit "C" of this date.

Mr. LEVIS: I also offer in evidence a receipt for the sum of $150 delivered on the same date, namely, the 27th day of October, 1904, simultaneously with the delivery of the stock, delivered by Jacob Berry & Co. to W. C. Bowers.

The paper was marked Trustees' Exhibit "D" of this date.

The claimant William C. Bowers, offers in evidence a check for $150 paid to Jacob Berry & Co. on the 27th day of October, 1904.

This paper was marked Claimant's Exhibit "E" of this date.

Mr. LEVIS: It is agreed that all the claims included in this proceeding and all the testimony taken in this proceeding is pursuant to an order of the Honorable George C. Holt, giving the Referee power to hear and report.

It is stipulated that the following facts happened in connection with the pledging of this stock to the Hanover National Bank and its sale, where same was sold:

162 The Hanover National Bank, on the morning of the 25th day of November, 1904, loaned to Jacob Berry & Co., the bankrupts, the sum of $45,000 and as security for such loan held the note of Jacob Berry & Co., which had been executed some two months before and which provided that all future loans were taken subject to the conditions of this note. A copy of this collateral note is hereby offered in evidence and marked Trustees' Exhibit "B," July 20th, 1905. On the same day, pursuant to the terms of this note, Jacob Berry & Co. delivered to the Hanover National Bank, as collateral security for this loan, various certificates of stock of the value on that day of about $56,500. The securities so delivered include the securities for which the various claims were filed in this proceeding and all of these certificates of stock were delivered to the Hanover National Bank on the 25th day of November, in pursuance of and upon the understanding that they were held as collateral to this loan, under the terms of the stock note.

This loan of $45,000 was unpaid up to the moment of failing or assignment for the benefit of creditors of Jacob Berry & Co. to Ashbel P. Fitch, Jr., as assignee, which assignment was filed on the morning of the 26th day of November, 1904. Subsequent to the filing of the assignment for the benefit of creditors, and on the 26th day of November, 1904, Henry R. Carse, the Assistant Cashier of the Hanover National Bank, took all the certificates of stock to the value of about $56,500 worth, then in the possession of the Bank, as collateral for

this note, to their broker's to be sold. The said 26th day of November being Saturday the stock was sold for future delivery. Upon return from the broker's, Mr. Carse requested the bookkeeper of the Bank to ascertain the amount of the deposit account of Jacob Berry & Co. The bookkeeper reported, upon balancing the account,
163 that the deposit in the bank at that time to the credit of Jacob Berry & Co. was $13,590.31. Mr. Carse then gave instructions to the bookkeeper to apply this balance upon the loan of $45,000, and an entry was made upon the books of the bank applying this deposit account of $13,590.31 upon the loan of $45,000. The bank, upon experiencing some difficulty in delivering certain of the certificates, notably those of Anna D. Taggart and J. M. Davies, withdrew some of the certificates, although already sold, and made other arrangements to carry out such portions of the sale made on the 26th day of November and kept in their possession some of the certificates of stock. Subsequent to this application of the deposit account and the sale of stock, the Hanover National Bank restored to the Trustees all funds and stocks over and above the amount of their advances to wit, the said sum of $45,000. They returned to the Trustees in money the sum of $6,310.41 and the following certificates of stock:

2 shares New York, New Haven & Hartford Railroad Company, Certificate No. 64,640.

50 shares United States Steel Corporation, preferred, Certificate No. C15,546.

33 shares United States Steel Corporation preferred, Certificate No. A30,563.

50 shares Chicago & Alton Railroad Company, Certificate No. A2,229.

80 shares Chicago, Indianapolis & Louisville Railroad Company, Certificate No. A2,264.

10 shares Union Bag & Paper Company preferred, Certificate No. A2,845.

10 shares United States Steel Corporation, common, Certificate No. A47,114.

And 30 shares of United States Steel Corporation common stock, Certificate No. 36,205, was delivered by the Hanover National Bank for transfer, to the United States Steel Corporation. Said cor-
164 poration refused to transfer the certificate, and the said certificate now remains in the possession of the United States Steel Corporation, to which said corporation lays no claim but holds, to be delivered either to the claimant, John M. Davies, or to the Trustees in bankruptcy, as the Referee herein may decide and it is agreed that this certificate shall be regarded, as far as this proceeding is concerned, as if the said certificate was in the possession of the Trustees in bankruptcy.

The following certificates of stock have been claimed by claimants in this proceeding, which were sold by the Hanover National Bank to reimburse themselves for their loan, and set opposite the various certificates of stock appears the sum realized by the bank on the said securities:

3 shares United States Steel Corporation, preferred, Certificate No. 88726	$283.87
20 shares Atchison preferred, Certificate Numbers 99,640 and 99,669	2,072.50
200 shares Hocking Coal & Iron, Certificates Numbers 2179 and 1747	3,087.50
16 shares United States Steel Corporation, Certificate Number F48,369	472.00
10 shares Railway Steel Springs, Certificate No. A1,361	327.50

The value of the certificates of stock now in the possession of the Trustees, on the 26th day of November, 1904, was as follows:

	2 shares New York, New Haven & Hartford Railroad Company	389.75
	83 shares United States Steel Corporation, preferred	7,874.62
	10 shares United States Steel Corporation, common	295.00
	30 shares United States Steel Corporation, common	885.00
	50 shares Chicago & Alton	2,000.00
165	80 shares Chicago, Indianapolis & Louisville	6,000.00
	10 shares Union Bag & Paper Company, preferred.	750.00

The value of the securities now in the possession of the Trustees, as of the date of the closing of this proceeding, namely, the 20th day of July, 1905, is as follows:

2 shares New York, New Haven & Hartford Railroad Company	402.00
83 shares United States Steel, preferred	8,507.50
10 shares United States Steel, Common	345.00
30 shares United States Steel, Common	1,035.00
50 shares Chicago & Alton	1,025.00
80 shares Chicago, Indianapolis & Louisville	6,400.00
10 shares Union Bag & Paper Company, preferred	720.00

Mr. LEVIS: The Trustees in bankruptcy herein urge a claim upon these certificates of stock to the amount of $7,279.90, being the difference between the deposit account on said Saturday, the 26th day of November and the cash refunded to the Trustees in bankruptcy by the Hanover National Bank. The Trustees claim that the Hanover National Bank applied the deposit account of $13,590.31 upon this loan without any warrant or legal right. In making this claim the Trustees of course waive no rights to any certificates of stock to which these claimants may not prove title.

Mr. LEVIS: I move to dismiss the claims of all the various claimants and petitioners herein, on the ground that no satisfactory identity has been proven to any specific certificates of stock claimed. On the ground that no sufficient facts have been proven to establish a cause of action to reclaim the certificates of stock from these
166 Trustees. On the ground that said certificates became merged into the general funds of the bankrupt and cannot be followed in reclamation. On the ground that the said claimants, with the exception of those whose stock was delivered for sale, bear the relation of

creditors to this estate and cannot claim a preference in the application of the assets of the estate over other creditors. On the ground that the delivery of certificates of stock pursuant to the various bought notices introduced into evidence approximated the said stock to cash and does not permit the reclamation of the specific certificates. On the ground that by dealing with the bankrupt under the form of this contract the claimants waived all right to claim the certificates delivered as collateral security and held on margin, as their property. On the further ground that as to those who have proved a claim in bankruptcy and voted for Trustee, that the claimants have elected to regard themselves as creditors and they are guilty of laches in now attempting to change that stand. On the further ground as to those who have reserved the right in their proofs of claim to recover the certificates, that the value of the proof of claim including the said certificates and the voting thereon for Trustees gave those claimants a greater power in the election of the Trustees than they should have had provided they were intending to rely upon the title to these certificates and that their vote for Trustee is a conclusive election to regard the conversion as one on contract and a waiver of the tort. And generally upon the ground that not sufficient facts have been proven to establish a cause of action.

Thereupon the hearing was closed.

(R1181)

167 United States Circuit Court of Appeals for the Second Circuit.

No. 274, October Term, 1905.

Argued May 21, 1906. Decided October 11, 1906.

In the Matter of JACOB BERRY & COMPANY, Bankrupts,
vs.
EDWARD S. THOMAS ET AL., Petitioners.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend, and Coxe.

WALLACE, *Circuit Judge:*

This is a petition by the trustees in bankruptcy of Jacob Berry & Co. to review an order of the Bankruptcy Court awarding to various claimants of the bankrupts certain securities or the proceeds thereof, in the possession of the trustees. Jacob Berry & Co. were stock brokers, and the claimants were severally customers of the firm.

Upon the general question whether the relation between customer and stock broker under the ordinary contract for a speculative purchase of stock is that of pledgor or pledgee, we are in accord with the

decision of the court below, and have recently decided that such a relation does exist in Richardson, Trustee, *v.* Shaw, *et al.*

The claimants of the pledged stock in this case are not seeking to follow into the hands of the trustees in bankruptcy the pro-
168 ceeds of stock purchased for them by the brokers but are seeking the proceeds of stocks which they had deposited with the brokers upon opening an account, or in the course of dealings, for speculative purposes. The contract between them and the brokers is found in the receipt delivered to each one of them by the brokers at the time of deposit and is illustrated by the receipt of Mrs. Taggart, which reads as follows:

"SEP. 14, 1904.

"Received from Anna D. Taggart 83 shs. U. S. Steel pfd. No. A30563–c15546. The same to be a general deposit and this receipt is given and received with mutual understanding that Jacob Berry & Co. may hold the same as margin and as security for or apply the deposit in part payment of or on account of losses or any other transactions in the purchase or sale of stocks, bonds, securities or commodities made by them for your account.

"This receipt is given and received upon the further understanding and agreement in consideration of Jacob Berry & Co. executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone; that the said Jacob Berry & Co. may repledge, rehypothecate or loan any or all of said stocks, bonds, securities or commodities held by them on account thereof as margin or otherwise; may substitute similar stocks, bonds, securities or commodities therefor, and that said Jacob Berry & Co. may, without notice upon the approximate exhaustion of margin sell, or buy as the case may be, any stocks, bonds, securities or commodities bought and sold or held by them as collateral, or margin, or otherwise, and that in case of contracts for future delivery that said Jacob Berry & Co. may close the same by purchase or sale as the case may be, without notice, provided however, that such purchases or sales may be made upon the Consolidated Stock and Petroleum Exchange of New
169 York, the New York Stock Exchange, the Chicago Board of Trade, or in any other Exchange in the City of New York where such stocks, bonds, securities or commodities are dealt in.

"No. A30563—33 Shs.
No. c15546—50 "

GEO. M. DAVIS, *Mgr.*"

The question upon which the rights of the parties really depends is whether the relation of pledgor and pledgee is created between client and stock broker by a deposit of this character, or whether such a deposit is not in effect a release of the client's title to the security to the broker which creates the relation of creditor and debtor. If the deposit is to be regarded as a deposit of money, the broker is impliedly authorized to sell the stock and credit the proceeds to the client in account. If it is deposited merely as

security, the relation of pledgor and pledgee certainly continues until losses arise which justify a sale of the stock. In the present case the brokers did not sell the securities deposited by the several claimants to meet marginal requirements on account of losses, but hypothecated them in a lump to obtain a loan to themselves.

It will be observed that the contract contains two distinct provisions: One relating to the deposited stock, and the other relating to the stocks, securities, etc., which the brokers are to purchase or sell for the client. It is the latter alone that the brokers "may repledge, rehypothecate or loan," when held by them as margin or otherwise. As to the deposited stock, they "may hold the same as margin and as security" for losses on any transaction, or may apply it in part payment of or on account of such losses. If money had been deposited instead of the securities, it would ordinarily have been credited on account to the clients and stood as a margin against losses; and as to any balance in the brokers' hands at any time the clients would have been merely creditors. If the securities had been deposited under a stipulation in the contract that they should stand as a margin for a specific sum, perhaps the same legal consequences would have attended the transaction. But there is nothing in
170 terms, nor as we think by implication, which suggests that the parties contemplated any sale of the deposited stock to the brokers, or any sale or disposition of it by the brokers except in the event of losses of the client, approximately exhausting the marginal requirement.

The order under review is affirmed with costs to the claimants severally.

J. M. Rosenberg, for the Petitioners.

R. L. Sweezey, Graham Sumner and *A. W. Putnam*, for the Respondents.

171 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 22nd day of October one thousand nine hundred and six.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

In the Matter of JACOB BERRY & COMPANY, Bankrupts.

EDWARD S. THOMAS ET AL., Petitioners.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs to the claimants severally.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. K. T.
A. C. C.

172 Endorsed: United States Circuit Court of Appeals, Second Circuit. *In re* Berry & Co. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Oct. 22, 1906. William Parkin, Clerk.

173 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 172 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case Matter of Berry & Company, E. S. Thomas *et al.*, Petitioners, as the same remain of record and on file in my office.

In Testimony Whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 12th day of December, in the year of our Lord One Thousand Nine Hundred and Six and of the Independence of the said United States the One Hundred and thirty-first.

[Seal of United States Circuit Court, Second Circuit.]

WM. PARKIN, *Clerk.*

Endorsed on cover: File No. —. U. S. circuit court of appeals, 2d circuit. Term No. —. Edward S. Thomas, Lloyd M. Howell, and Ashbel P. Fitch, trustees in bankruptcy of Jacob Berry and Harold L. Bennet, individually and as Jacob Berry & Company, *vs.* Anna D. Taggart *et al.*

174 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there in now pending before you a suit entitled In the Matter of Jacob Berry & Company, bankrupts, Edward S. Thomas, Lloyd M. Howell and Ashbel P. Fitch, Trustees, petitioners, on a petition to review an order of the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
175 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of January, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

176 [Endorsed:] File No. 20,524. Supreme Court of the United States. No. 559, October Term, 1906. Edward S. Thomas, *et al.*, Trustees &c., *vs.* Anna D. Taggart *et al.* Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 25, 1907. William Parkin, Clerk.

177 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of JACOB BERRY & COMPANY, Bankrupts; EDWARD S. THOMAS *et al.*, Petitioners.

It is hereby stipulated between the respective counsel for the petitioners and respondents that the certified transcript of the record now on file in the office of the Clerk of the Supreme Court of the United States at Washington, D. C. shall be taken and regarded as a return to the writ of certiorari directed to the Honorable Judges of the U. S. Circuit Court of Appeals for the Second Circuit requiring that the records shall be certified to the Supreme Court in order that the said Court may act thereon as of right and according to law ought to be done, said — being dated the 22nd day of January, 1907.

It is hereby stipulated that a certified copy of this stipulation may be forwarded by the Clerk of the Circuit Court of Appeals for the Second Circuit as his return to the said Writ of Certiorari.

Dated, New York, January 28, 1907.

JAMES, SCHELL & ELKINS,
Attorneys for Petitioners.
SIMPSON, THATCHER & BARTLETT,
Att'ys for Respondent Anna D. Taggart.
——— ———,
Att'ys for Respondent George E. Hall.
RICHARD L. SWEEZY,
Att'ys for Respondent Harris Filson.
E. T. CHAPPELL,
Att'y for Respondent George Donaldson.
SAMUEL BITTERMAN,
Att'y for Respondent William C. Bowers.

178 Endorsed: United States Circuit Court of Appeals for the Second Circuit. In the Matter of Jacob Berry & Company, Bankrupts. (Original.) Stipulation as to return to Writ of Certiorari. James, Schell & Elkus, Attorneys for Petitioners, 50 Pine Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals Second Circuit. Filed Mar. 25, 1907. William Parkin, Clerk.

179 To the Supreme Court of the United States:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as a return to the writ of certiorari issued herein.

Dated New York, March 27th, 1907.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

180 [Endorsed:] 559, 20524. United States Circuit Court of Appeals, Second Circuit. Matter of Jacob Berry & Co., Bankrupts. Return to Certiorari. 1.90.

181 [Endorsed:] File No. 20524. Supreme Court U. S. October Term, 1907. Term No. 197. Edward S. Thomas *et al.*, Petitioners, *vs.* Anna D. Taggart *et al.* Writ of Certiorari and return. Filed March 30th, 1907.

Supreme Court of the United States,

OCTOBER TERM, 1907.

EDWARD S. THOMAS, ASHBEL P. FITCH, Jr., and LLOYD M. HOWELL, Trustees in Bankruptcy of Jacob Berry & Company,

Petitioners,

AGAINST

ANNA D. TAGGART, HARRIS FILSON, GEORGE DONALDSON, WILLIAM C. BOWERS and GEORGE E. HALL,

Respondents.

No. 197.

Motion to Advance.

Thomas Thacher, Richard L. Sweezy, George E. Hall and Everett T. Chappell, on behalf of respondents, respectfully move the Court to advance the above-entitled cause on the docket, so that it may be argued with the case of Richardson *vs.* Shaw, No. 126.

This is a proceeding begun in the Bankruptcy Court for the Southern District of New York to determine the title to shares of stock which came into the possession of petitioners upon their appointment as Trustees of the estate of Jacob Berry & Company, stockbrokers.

This case has been brought here by writ of certiorari, upon petition of the Trustees. Referring to the case of Richardson *vs.* Shaw, petitioners, in their brief upon their petition, said:

> "This Court, in October last, granted a writ of certiorari to consider the ruling there made, and in view of the similarity between the cases, in view of the fact that both passed upon the same question, and in view of the fact that both involved the relation between a broker and his customer, the one in reference to the marginal purchase, and the other in reference to the collateral margins, this case should also be considered by this Court."

It therefore seems proper that this case should be argued with Richardson *vs.* Shaw.

Respectfully submitted,

THOMAS THACHER,
Attorney for Anna D. Taggart.
RICHARD L. SWEEZY,
Attorney for Harris Filson.
GEORGE E. HALL,
In his own behalf.
EVERETT T. CHAPPELL,
Attorney for George Donaldson.

Petitioners concur in this motion.

ABRAM I. ELKUS,
JAMES N. ROSENBERG,
ROBERT P. LEVIS,
Attorneys for Petitioners.

Office Supreme Court, U. S.
FILED.
JAN 12 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

EDWARD S. THOMAS, ASHBEL P. FITCH, Jr., and LLOYD M. HOWELL, Trustees in Bankruptcy of JACOB BERRY & COMPANY,
Petitioners,

against

ANNA D. TAGGART, HARRIS FILSON, GEORGE DONALDSON, WILLIAM C. BOWERS and GEORGE E. HALL,
Respondents.

No. [redacted]197.

Please take notice that a petition, of which a copy is annexed, will be presented to the Supreme Court of the United States at the Capitol in the City of Washington, D. C., on the 14th day of January, 1907, at the opening of Court, and a motion will be made for a writ of certiorari as prayed therein.

Dated December 29, 1906.

Yours, etc,,

ABRAM I. ELKUS,
Attorney for Petitioner.

TO SIMPSON, THATCHER & BARTLETT,
Attorneys for Anna D. Taggart.

SWEEZY & GLOVER,
Attorneys for Harris Filson.

EVERETT T. CHAPPELL,
Attorney for George Donaldson.

ALBERT W. PUTNAM,
Attorney for George E. Hall.

SAMUEL BITTERMAN,
Attorney for William C. Bowers.

SUPREME COURT OF THE UNITED STATES.

EDWARD S. THOMAS, ASHBEL P. FITCH, Jr. and LLOYD M. HOWELL, Trustees in Bankruptcy of JACOB BERRY & COMPANY,
Petitioners,

against

ANNA D. TAGGART, HARRIS FILSON, GEORGE DONALDSON, WILLIAM C. BOWERS and GEORGE E. HALL,
Respondents.

Petition for Writ of Certiorari directed to the Circuit Court of Appeals for the Second Circuit.

TO THE HONORABLE CHIEF JUSTICES AND ASSOCIATE JUDGES OF THE SUPREME COURT OF THE UNITED STATES.

The petition of Edward S. Thomas, Lloyd M. Howell and Ashbel P. Fitch, Jr., respectfully shows this Court:

On the 4th day of January, 1905, your petitioners were appointed trustees in bankruptcy of the firm of Jacob Berry & Company, and duly qualified by the giving of the bond required of them.

That in the course of the administration of the said estate, an order was made by the Hon. George C. Holt in the United States District Court for the Southern District of New York, on the 25th day of March, 1905, requiring all persons who as-

serted any claims to certain certificates of stock, or 7
the proceeds of certain certificates of stock which had been turned over to the trustees in bankruptcy by the Hanover National Bank, should be required to file a notice of claim, and give testimony concerning their rights before a certain time or be barred from asserting any title to the ownership of any of such certificates of stock, and the said order directed the Hon. Stanley W. Dexter as Special Commissioner to hear and determine the rights of all such claimants, and to render a report to the District Court (*fols. 66, 75*).

The conditions with reference to the bankrupt 8
estate which this order was intended to meet were as follows: On the 25th day of November, 1904, the day prior to the filing of the petition in bankruptcy, Jacob Berry & Company had procured a loan of $45,000 from the Hanover National Bank of the City of New York, and as collateral security for this loan had deposited with the said bank, a large number of certificates of stock of various kinds (*fol. 45*). On the day that the petition in bankruptcy was filed, the loan being unpaid, the Hanover National Bank sold the certificates of stock deposited as collateral security and turned over to the 9
trustees in bankruptcy the surplus which remained after the said bank had reimbursed itself for its loan. This surplus consisted of seven certificates of stock and $6,310.41 in cash (*fols. 46, 47*).

Certain of the customers of the bankrupts, stock brokers, made claim to both the certificates of stock and to the cash restored by the bank, on the ground that they were the owners of the said certificates pledged by Jacob Berry & Company to the Hanover National Bank, and they asserted that the pledging of their certificates was in fraud of their rights. Certain of the customers claimed to be entitled to have the certificates of stock returned, and certain other of the customers claimed to be entitled to the

10 moneys as representing the proceeds of their stock. In order to determine the legal rights and interests of these various claimants and determine the equities between these various parties, the United States District Court entered an order directing the claimants to prove their title in one omnibus proceeding.

On the 22nd day of August, 1905, the Special Commissioner filed a report, setting forth his findings in regard to the ownership of the certificates and cash. He found that seven of the claimants were entitled either to certificates of stock or to moneys (*fols. 82–180*). The District Court
11 for the Southern District of New York on the 23rd day of October, 1905, confirmed the report of the said Special Commissioner, and directed the trustees in bankruptcy to deliver certificates of stock to three claimants and sums of money to two claimants (*fols. 202–213*),

Your petitioner then took a petition to review the said ruling to the United States Circuit Court of Appeals for the Second Circuit, and the said Court issued its mandate affirming the order of the Special Commissioner and the District Court with costs to the several claimants.

12 The District Court directed that the trustees in bankruptcy make the following distribution from the assets of the bankrupt estate then in their hands as follows:

To Anna D. Taggart, 83 shares of the preferred stock of the United States Steel Corporation valued at $8,507.50.

To George E. Hall, 10 shares of the common stock of the United States Steel Corporation valued at $345.

To William C. Bowers, 2 shares of the common stock of the N. Y., N. H. & H. R. R. valued at $402.

To Harris Filson, the sum of $2,072.50.

To George Donaldson, the sum of $283.87 (*fols. 209, 213*).

The facts surrounding the transactions of these 13
five customers with the bankrupt stock brokers were identical with but slight variations. All of the customers had speculative accounts with Jacob Berry & Company, who were buying and selling for these customers "on margin." None of the customers at the time they gave the orders for the marginal purchases of stock, paid for the stock in full, and in lieu of supplying the *usual cash margin* to the broker, they delivered to him certificates of stock. In place of cash, the customers deposited stock, and Jacob Berry & Company thereupon executed the speculative orders which the customers 14
requested.

At the time of the deposit, the customers accepted a receipt stating the conditions upon which Jacob Berry & Company received the stock. The receipt after naming certificates deposited, provided as follows :

> "The same to be a *general deposit*, and this receipt is given and received with the mutual understanding that Jacob Berry & Company may hold the same *as margin*, and as security for or apply the deposit in part payment of or on account of losses on any or 15
> all transactions in the purchase or sale of stocks, bonds, securities or commodities, made by them for your account.
>
> This receipt is given and received upon the further understanding and agreement in consideration of Jacob Berry & Company, executing such orders for the purchase or sale of stock, bonds, securities or commodities as may be given to them in writing orally, by telegraph or telephone ; and the said Jacob Berry & Co., may repledge, rehypothecate, or loan any or all of said stocks, bonds, securities or commodities, held by them on account thereof as margin or otherwise ; may substitute similar stocks, bonds, securities or commodities therefor, and that said Jacob Berry & Company, may, with-

out notice upon the approximate exhaustion of margin sell, or buy as the case may be, any stocks, bonds, securities or commodities bought or sold or held by them, as collateral, or margin, or otherwise, and that in case of contracts for future delivery that said Jacob Berry & Company may close the same by purchase or sale, as the case may be, without notice, provided, however, that such purchases or sales be made either upon the Consolidated Stock and Petroleum Exchange of New York, the New York Stock Exchange, the 'Chicago Board of Trade,' or in any other Exchange in the City of New York where such stocks, bonds, securities, or commodities are dealt in.

Signed JACOB BERRY & COMPANY."

The receipt expressly provided that the certificate handed over was to be "a general deposit," that the brokers might "repledge, rehypothecate or loan" the certificates, might "substitute similar certificates," and might sell the stock deposited without notice upon the approximate exhaustion of margin. Whenever a purchase was made by Jacob Berry & Co. for any of these customers, he forwarded them what was known as a "bought notice" which set forth in practically the same form as above the conditions under which the stock-brokers were executing the order.

The respondents sought to recover the stock on the theory that they had title to the certificates and the question which the Appellate Court had before it to pass upon, was whether the relation created between a stock broker and his customer was that of pledgor and pledgee or that of debtor and creditor, and whether when these customers delivered stock to protect a speculative account *in lieu of cash margin*, under a contract permitting the pledging of the stock and the subtitution of other certificates by the broker, they were entitled

to the return of the stock in preference to all other creditors of the bankrupt estate. 19

The Appellate Court on the general proposition decided that the relation created between the stock broker and his customer was that of pledgor and pledgee, and cited in support of that proposition the case of *Richardson* vs. *Shaw* recently decided by that Court. A writ of certiorari has been granted in October, 1906, by this Honorable Court directing that the record and proceedings of the Circuit Court of Appeals should be brought before this Court for review, and the matter is now pending. 20

The finding of the Circuit Court of Appeals for the Second Circuit is directly opposed to that of the Circuit Court of Appeals for the First Circuit, which in *Swift's* case (*112 Federal Reporter, 319*) held that the relation created between a broker and his customer in speculative dealings was that of debtor and creditor. This conflict is due apparently to difference between the law of Massachusetts (*Covell* vs. *Loud, 135 Mass., 41*) and the law of the State of New York (*Markham* vs. *Jaudon, 41 N. Y., 235*). Your petitioner contends that the law of New York is unsound and has involved its courts into numerous contradictions and cannot be applied to transactions like that at bar, without destroying one of the fundamental principles of the Bankruptcy Act that all creditors should share equally. 21

The decision of *Markham* vs. *Jaudon* (*45 N. Y., 285*) upon which the District Court relies as binding upon it, is dissented from by a portion of the Court, is criticised by the same Court (*Morgan* vs. *Jaudon, 40 How.* (*N. Y.*), *246*), and is expressly overruled in part in *Baker* vs. *Drake* (*52 N. Y., 217*). The rule adopted by the Circuit Court of Appeals for the Second Circuit is contrary to the rule of the English Bankruptcy Courts (*Benlinck* vs. *London Bank, L. R. Chan. Div., 120, p. 140*), and opposed to the spirit

of the decisions of this Court, where, when passing upon the question as to whether certain debts were dischargeable in bankruptcy, this Court has held that so far as a speculative marginal account is concerned, the broker does not act in a fiduciary capacity, but his relation to his customer is merely a contractual one, and that of debtor and creditor.

The Circuit Court of Appeals of the First Circuit in *Swift's* case (*112 Federal Reporter, 319*) has made the following comment on this pretended difference between the law of New York and that of Massachusetts.

> "There was much discussion before us and in the District Court whether or not this rule is peculiar to Massachusetts, and it is so only in name and not in substance. The Courts in New York use somewhat qualified language and nominally describe the relations as those of pledgors and pledgee, but the substantial condition is the same there as in Massachusetts."

Your petitioners urge that the mere calling a certain relation that of pledgor and pledgee by the New York Court should not be permitted to defeat the general creditors of the bankrupt estate and withdraw from the trustees in bankruptcy practically all moneys and stock received from the Hanover National Bank where *the transaction is in fact inconsistent with a pledge and bears none of its essential earmarks.* It could not be urged that if the creditors had deposited cash that they would have been permitted to recover the cash deposited in preference to all other creditors. Instead of depositing cash these respondents deposited certificates of stock to be used by the brokers as a basis for the purchase of other certificates. The *cash margin* deposit is regarded as a portion of the purchase price delivered by the customer, the broker loaning to the customer the remainder of

the purchase price, in fact one of the respondents 25
testified that the stock he delivered was to be used as the purchase price of other stock *(fol. 257)*. This relation ought not to be changed in the case of a *stock margin* because of the names adopted in a New York decision, where the original decision has been modified, changed and broadened.

Your petitioners urged upon the Appellate Court that the form of receipt given and accepted by the customer operated to make the difference between the Massachusetts and the New York theories immaterial. The features of the contract upon which your petitioners relied were, 26

(1) The provision that the stock delivered was to be regarded as "a general deposit" (*fol. 387*). Your petitioners urged that this course negatived any suggestion of a special holding or pledge relationship and that, on the contrary, showed that the intention of the parties was that the stock was to be deposited as collateral for the margin account.

(2) There was a further provision that the bankrupt brokers might "hold the same as margin." It was contended that a broker holds cash margin as portion of the purchase price of the stock, and 27
that the title to the margin has passed to the broker.

(3) The broker had a right to repledge the deposited certificates (*fol. 399*). This implied that the depositor might be deprived of his certificate in case the stock broker did not live up to the conditions of his repledging, and to such deprivation of title the customer expressly consented.

(4) There is a right on the part of the broker to *substitute similar certificates*. The customer expressly states, therefore, that he cares nothing about the identical certificates which he deposits. That all he wishes is a certificate of like kind.

(5) There is the broad permission to sell upon the approximate exhaustion of margin *without notice*.

28 Under such a contract your petitioners urge that the customer waives all title to the certificate deposited by him, destroys the relationship of pledgor and pledgee even under the New York decisions, and is placed in the position of debtor and creditor.

The essential feature of a pledge is that there should be a necessity on the part of the pledgee to keep the *identical* thing pledged in order that it may be returned to the pledgor when the conditions of the pledge are satisfied. Any terms in the contract of deposit which are inconsistent with the requirement of a holding of the thing deposited,
29 passes title to the certificate. In the case at bar, the broker would have satisfied the contract had he returned some kind of property similar to the customer, *but not the identical property deposited.*

The Courts of the State of New York which the Circuit Court of Appeals felt constrained to follow, have held that the relation of bailment or pledge is destroyed where there is not a duty on the part of the pledgee to return the identical property deposited. Where the pledgee may substitute a similar thing of like kind it has been held to be a case of "sale and exchange," and this Court has so de-
30 cided.

The New York Courts themselves, in the case of *Ogden* vs. *Lathrop (64 N. Y., 158)*, have held that where a stock broker has authority to use, transfer and hypothecate the stock the case is without the ordinary pledgor and pledgee ruling. Upon the broad powers of disposition, substitution and control granted by this contract, your petitioners urge that the Appellate tribunal erred in finding that the title to the certificates had not passed to the broker and become a part of the bankrupt estate.

The Circuit Conrt of Appeals in its opinion conceded that the customer who deposited money would be merely a creditor and adopted the strange construction that in order that securities might be in

the same condition, it was necessary that the 31
securities should stand "as a margin for a specified sum." Your petitioners assert that the Appellate Court erred in this ruling, a general deposit of stock as margin should have the same effect as a deposit for a specified margin, and that it should have found that the deposit of certificates in lieu of cash in a speculative account assimilated the stock deposited to cash and created the relation of debtor and creditor.

George E. Hall, one of the respondents, filed a proof of debt as a general creditor and voted this claim at a contested election for trustees (*fol. 144*). The claim 32
was for $1,875, and the claimant included in that sum the value of the certificate which he sought to recover in this proceeding. At the end of the proof of debt the claimant inserted a clause that he did not waive any rights to recover the certificate. The proof of debt is still on file for the sum of $1,875, and no offer to withdraw it has been made, nor no attempt to reduce it. Hall was allowed to recover his stock despite these facts.

Your petitioners asserted to the Appellate Court that the claimant could not prove the value of his certificate as a general creditor on the theory that 33
there has been a conversion of the stock, and later reverse this position and assert that there has been no conversion and that he retains title to the certificate. Petitioners maintained that at the time of the filing of the proof of claim, the claimant must either ratify the conversion of the stock and prove for its value, or repudiate the transaction with the bankrupts and claim title to the certificate. He cannot do both. The claimant's election was shown by filing a claim *in debt* for the value of the certificate, by voting at the enlarged amount for trustees, by allowing the claim to remain on file unchanged. When faced with a choice of two incon-

sistent remedies, he must choose one or the other, and having once chosen he is bound by the election.

The Appellate Court did not pass upon this question in its opinion, but by affirming the lower Court has permitted a practice which opens the door to possible frauds of larger proportions. Hall voted his claim at a larger figure than he had a right to in view of his present stand. It might well be in a closely contested election for trustee, such a claim might be the determining factor and a trustee be elected who was favorable to the person who was seeking to deprive the estate of property. The result of such practice will be to permit persons not creditors but who claim title adverse to the creditors, to take part in and control the election of a trustee who will act in these non-creditors' interests, and thus defeat the whole plan and intent of the Bankruptcy Act which is to place the administration of the bankrupt's affairs in the hands of the creditors.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of this Court directed to the Circuit Court of Appeals for the Second Circuit to the end that the record together with all the proceedings of the said Circuit Court of Appeals may be brought before this Court for such review as may be deemed proper.

And your petitioners will ever pray.

Edward S Thomas
Lloyd M. Howell
Asahel P. Fitch Jr.

Petitioners.

Abram L Elkus

Of Counsel.

UNITED STATES OF AMERICA, Southern District of New York, } ss. : 37

EDWARD S. THOMAS, LLOYD M. HOWELL and ASHBEL P. FITCH, Jr., being duly sworn, depose and say that they have read the foregoing petition and that the same is true, except as to matters alleged on information and belief, and as to those matters they believe it to be true.

Edward S Thomas
Lloyd M Howell
Ashbel P. Fitch Jr

Sworn to before me this 31st day of December, 1906. } 38

(Seal)
Nathaniel Corlhof
Notary Public

39

The Tuttle, Morehouse & Taylor Co., Law Printers, New Haven, Conn.

Supreme Court, U. S.
FILED.
JAN 14 1907
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

EDWARD S. THOMAS, ASHBEL P. FITCH, Jr., and LLOYD M. HOWELL, Trustees in Bankruptcy of JACOB BERRY & COMPANY,

PETITIONERS,

against

ANNA D. TAGGART, HARRIS FILSON, GEORGE DONALDSON, WILLIAM C. BOWERS and GEORGE E. HALL,

RESPONDENTS.

197.

BRIEF OF RESPONDENT, GEORGE E. HALL.

The respondent, George E. Hall, contends, that the petitioners' motion should not be granted.

> A writ of certiorari will not be issued except where questions of gravity and importance are involved, or where there is a conflict of decision between two or more courts of appeal, and then this power will only be exercised sparingly and with great caution.

> The inquiry upon an application for a writ of certiorari is whether the matter is of sufficient importance in itself and sufficiently open to controversy.
>
> Lau Ow Bew, Petitioner, 141 U. S., 583, 589.
> Forsyth vs. Hammond, 166 U. S., 514.
>
> Granting of the writ depends upon the discretion of the court.
>
> Ex parte Hitz, 111 U. S., 766.

The petitioners incidentally state in their brief (page 2) that the question presented by them is important, because,—"It affects a countless number of persons, both customers and brokers, who deal in stocks speculatively." A mere statement of this character is not sufficient to warrant the granting of the petition upon the ground that the questions involved are of "gravity and importance," for it is invariably true of every case that the decisions of the Court affect many persons.

The motion is in fact based upon a claimed conflict between the decisions of the Circuit Court of Appeals for the Second Circuit in the case at bar and that of the Circuit Court of Appeals for the First Circuit In re Swift, et al., 112 Federal Reporter, 315. The decision in Swift's case is based upon a state of facts wherein the *broker bought stocks* for his customer. In the opinion of the Court, Judge Putnam says:—(page 317)

> "In order to understand correctly those positions, it is necessary to determine the nature of the relations between a stock broker and his customer *under the circumstances of the case at bar,*" and further on, "We accept the law as well settled alike by local usage in Massachusetts, where the dealings took place, and by the implied necessities of public transactions in stocks, as well as by general acquies-

> cence and sound sense, that the *ordinary relations* between stock brokers and their customers are executory for the sale and purchase of stock."

In the case at bar the question decided by the Circuit Court of Appeals was whether customers having a speculative account with brokers and depositing certificates of stock, which stood in the name of the customer, with the broker as collateral and the broker subsequently becoming insolvent, whether said certificates deposited by the customer and then in the hands of the broker's trustee in bankruptcy should be returned to the customer or retained by the trustee, there being no claim or lien by the broker or his trustee against said certificates.

There is no controversy in this case over any stocks *bought by the bankrupts,* which would be necessary to bring it within the ruling in Swift's case.

The *"circumstances of the case at bar"* referred to in Swift's case, ante, are quite different from the case at bar, for instead of the broker (bankrupt) buying stock for the customer (respondents) they deposited with the broker, as collateral, certificates of stock belonging to them, which the broker used as collateral for his own loans.

The Court of Appeals in their opinion recognized the distinction between these cases.

> "The claimants of the pledged stock in this case are not seeking to follow in the hands of the trustees in bankruptcy the proceeds of stock *purchased for them by the brokers,* but are seeking the proceeds of stock (the respondent, Hall, is seeking the identical certificate), which they had deposited with the brokers upon opening an account, or in the course of dealings, for speculative purposes."

The petitioners also recognize this distinction in their "Supplemental Memorandum (brief) in Behalf of the Trus-

tees in Bankruptcy" filed in the Court of Appeals at the time the case was argued before said Court, and I take the liberty of quoting therefrom,—

> "The entire line of New York cases of which Markham vs. Jaudon (41 N. Y., 235) is the chief exponent, and which describe the relation of stock broker and customer as that of pledgee and pledgor, deal with stock *bought by the broker for his customer.* The cases at bar do not deal with such facts, but relate solely to stock deposited by the customer with the broker."

And again in their brief (pages 1 and 2) before this Court in the following language,—

> "The exact point to be decided is whether *customers* of stock brokers *who have deposited certificates* of stock with such brokers as margin, instead of money, upon a speculative account and where in accordance with an express contract, the stock broker may pledge the depositor's certificates, substitute other certificates and sell them without notice, *are entitled to re-claim such certificates when in the possession of trustees in bankruptcy.*"

There is a conflict between the decisions of the courts of New York and Massachusetts, but upon a question entirely different than that involved in the case at bar, and the differing views of these courts are well expressed in the case of Richardson, Trustee vs. Shaw, et al., 147 Federal Reporter, 659. The Court, after citing and discussing the case of Markham vs. Jaudon, 41 N. Y., 235, and the case of Chase vs. City of Boston, 180 Mass., 458, says,—

> "Here then, are the two antagonistic views; the one holding that where *a broker buys stock on a margin* the title is in the customer *for whom he buys;* the other that it is in the broker."

All of the cases cited in the brief of the petitioners have been determined upon a state of facts similar to those in Swift's case, ante, where the broker *bought for the customer,* with the exception of the case of Ogden vs. Lathrop, 65 N. Y., 158, wherein the question was largely one of the interpretation of a written contract, but even in that case, while the pledged certificates were not returned to the pledgor, similar certificates were in fact returned, so that the pledgor was not a loser by the transaction.

There is no case cited by the petitioners wherein the customer attempted to recover stocks deposited by him as collateral, where the decision is different than the decision of the Circuit Court of Appeals in the case at bar.

The case of Markham vs. Jaudon, 41 N. Y., 235, so severely criticized by counsel for petitioners, received the warm approval of the Circuit Court of Appeals in the case of Richardson, Trustee vs. Shaw, et al., 147 Federal Reporter, 659, as recently as June last, in the following language,—

> "The New York cases are not absolutely controlling upon this court, but even if we had more doubt regarding it we should still deem it our duty to adhere to a rule which has been in force for nearly 40 years and which is understood and constantly recognized as a guide in the management of immense financial transactions. The situation is one where stability, uniformity and certainty are of supreme importance and the court should be absolutely sure of its position before vexing the financial center of the country with so serious a conflict of authority upon a question of commercial law."

The facts set forth in the petition and petitioners' brief so far as they severally relate to the respondent, Hall, are grossly inaccurate.

The respondent, Hall, did not accept a receipt such as set forth on page 5 of the petition and petitioners' brief, but a receipt "Exhibit B," Record, page 154.

The respondent, Hall, did not vote his claim at a contested election for trustees, as set forth on page 11 of the petition, nor does "fol. 144" therein cited as authority warrant such statement. Folio 144, page 48, of the record, discloses, that "Hall participated actively at the meetings held for the election of a trustee," which is far from saying that Hall's claim was voted at a contested election for trustees. What actually did occur is set forth in folio 452, on page 152, of the record (statement of facts agreed to by counsel for petitioners), as follows,—

> "At the first meeting of creditors, on the 19th day of December, the Referee *announced* that there would be merely a filing of the claims and *an informal ballot for the purpose of obtaining an expression of opinion, not to be counted for the election of Trustee,* and that a short adjournment would be taken for the purpose of examination of claims, and that the formal election of Trustee would occur on the 21st day of December. On the 19th day of December, 1904, at this informal meeting, Mr. George E. Hall filed his claim and voted this claim for Trustee for Ashbel P. Fitch, Jr., the contest for such Trustee being between Ashbel P. Fitch, Jr., and Edward S. Thomas; on the 21st day of December, 1904, at the formal election, George E. Hall *did not vote his claim for either candidate for Trustee.*"

The claim was only voted on an informal ballot, not to be counted for the election of trustee, and at the formal election, held at a later day, the claim was not voted, not even for the sum of $250.00, which he might have voted under the petitioners' contention (Petitioners' Brief, page 7).

Hall *had a right to participate actively* at the meetings held for the purpose of electing trustees as he had a claim as shown by petitioners' brief entitling him to a voice to the extent of $250.00 personally, aside from a voice as attorney for a large number of other claimants, but refrained from voting upon his own claim, not even for the sum of $250.00. The allegation that "Hall influenced the election to the extent of a claim of $1600.00 greater than he was entitled to in view of his present position" (Petitioners' Brief, page 7) is shown by the above reference to the record to be incorrect.

The petitioners claim to be aggrieved because the appellate court did not pass upon this question in its opinion, but "by affirming the lower Court has permitted a practice which opens the door to possible frauds of larger proportions" (petition, page 12). When counsel are able to present facts to the Court truthfully it will be time enough to cry fraud, and the absolute ignoring of the claim of the petitioners, before the Circuit Court of Appeals, in this particular based upon such erroneous presentation of facts was as charitable a rebuke as could be administered by the learned jurists who sat in judgment thereon.

The respondent, Hall, submits that his action in refraining to vote for a trustee on the formal ballot will be less likely to open the door to fraud than the misrepresentation to the Court of admitted facts for the purpose of obtaining a temporary advantage and that this Court should stamp with its disapproval such practice as adopted by counsel for petitioners in this case, and should not permit their misstatements to stand as a loophole for abuse.

It is significant at this time to note that the trustees did not bring to the attention of the Court that the certificates of stock in question were in their hands until March 21, 1905

(Record, pages 15 to 22), three months after the creditors meetings for the election of trustees, and the record discloses nothing to indicate that at the time Hall filed his claim or attended said meetings, that he had any knowledge as to the location of his certificates of stock, who had the possession thereof, or that they were even in existence.

The respondent, Hall, has not attempted herein to meet the arguments of the petitioners upon the merits of the case, which are not before the Court at this time, but claims, however, that the petition should be denied and no writ of certiorari should be issued, because,—

1. The same being in the discretion of the Court, such discretion should not be exercised in favor of a petitioner whose prayer is based upon facts contradictory of their own record.

2. No question of gravity or importance is involved, and

3. There is no conflict of decision in any of the cases cited or between the decisions of the Circuit Court of Appeals in the present case and that of the Circuit Court of Appeals for the First Circuit.

Respectfully submitted,

GEORGE E. HALL,

Respondent.

Office Supreme Court, U. S.
FILED.
JAN 12 1907
JAMES H. McKENNEY,
CLERK.

197.

No. [redacted]

Supreme Court of the United States.

EDWARD S. THOMAS, ASHBEL P. FITCH, Jr., and LLOYD M. HOWELL, Trustees in Bankruptcy of JACOB BERRY & COMPANY,

Petitioners,

against

ANNA D. TAGGART, HARRIS FILSON, GEORGE DONALDSON, WILLIAM C. BOWERS and GEORGE E. HALL,

Respondents.

Petitioners' Brief.

Petition for writ of certiorari to bring before this Court the record in certain proceedings instituted in the District Court for the Southern District of New York to recover from the trustees in bankruptcy certain certificates of stock and certain sums of money, and carried by the petition for review to the Circuit Court of Appeals for the Second Circuit.

QUESTIONS INVOLVED.

The exact point to be decided is whether customers of stock brokers who have deposited certificates of stock with such brokers as margin, instead of money, upon a speculative account and where in accordance with an express contract, the stock

broker may pledge the depositor's certificates, substitute other certificates and sell them without notice, are entitled to re-claim such certificates when in the possession of trustees in bankruptcy, thereby securing a preference over the other creditors of the bankrupt stockbrokers.

The Circuit Court of Appeals for the Second Circuit has declared that under such circumstances the relation which exists between a stock broker and a customer is that of pledgor and pledgee, and that the customer is entitled to have his certificates returned to him as against all other creditors of the bankrupt estate.

The question presented is important for several reasons :

(1) It affects a countless number of persons, both customers and brokers, who deal in stocks speculatively.

(2) Two Circuit Courts of Appeals are in direct conflict upon this particular question. The *First* Circuit holds that so far as speculative transactions are concerned, the relation existing between broker and customer is that of debtor and creditor. The *Second* Circuit holds that the relation is that of pledgor and pledgee, with all the rights and incidents of title which flow from that relation.

(3) The decision below in adopting the New York theory of pledgor and pledgee has favored the customer who *deposits stock in lieu of cash margins* as against the customers depositing cash margins. In effect, it has preferred the first class of creditors over all other creditors of the bankrupt stock broker. It validates, under guise of law, a preference which defeats the intention and purpose of the Bankruptcy Statute.

(4) The question of the effect of a special agreement—an ordinary transaction in dealing with

stock brokers—is brought before this Court for consideration for almost the first time. The agreement involved here is similar to that used by the majority of stock brokers and brings up for review the effect of an agreement which authorizes the broker to pledge the stock held in the speculative account in general loans, to substitute similar certificates, and also to sell without notice upon approximate exhaustion of margin.

(5) The decision below, permitting one of the respondents to file a proof of debt as a general creditor, setting forth the value of certain certificates of stock, and voting thereon for trustee in bankruptcy, and later permitting the same person to institute proceedings to recover the certificates of stock upon which proof has already been made, on the theory that he is the owner of the stock, has opened the door for a control of the elections of trustees by persons who do not intend to adopt the position of creditors, and is contrary to the fundamental principles of the Bankruptcy Act that the administration of insolvent estates shall be in the hands of the creditors interested, solely.

Facts.

Jacob Berry & Company were stockbrokers doing business on the Consolidated Stock Exchange of the City of New York (*fol. 88*). On November 25th, 1904, these brokers borrowed $45,000 from the Hanover National Bank of New York City, and as collateral security for the loan deposited various certificates of stock of the value of about $56,500 (*fol. 81*).

On November 26, 1904, a petition in bankruptcy was filed against them, and the loan being unpaid, the bank in due course to repay itself sold the greater part of the certificates of stock held by it as

collateral (*fols. 482-483*). The bank returned to the trustees in bankruptcy seven certificates of stock and the sum of $6,310.41, the surplus arising from the sale (*fols. 92-93*).

After the bankruptcy certain of the customers of Jacob Berry & Company claimed this surplus upon the ground that the certificates of stock pledged to the Hanover National Bank by Berry & Co. were wrongfully hypothecated. The trustees in bankruptcy obtained an order directed to all persons who asserted any claim as against this surplus to file notice of their demands and to give testimony with reference to the said claim of title before the referee in bankruptcy (*fols. 66-75*).

The referee, after hearing all parties, reported that the following distribution should be made from the assets of the bankrupt estate:

To Anna D. Taggart, 83 shares of the preferred stock of the United States Steel Corporation valued at $8,507.50.

To George E. Hall, 10 shares of the common stock of the United States Steel Corporation valued at $345.

To William C. Bowers, 2 shares of the common stock of the N. Y., N. H. & H. R. R. valued at $402.

To Harris Filson, the sum of $2,072.50.

To George Donaldson, the sum of $283.87 (*fols. 82-180*).

This report was affirmed by the District Court, and again affirmed by the Circuit Court for the Second Circuit upon the petition to review the District Court's ruling.

The claims of these five respondents are alike in that all five delivered certificates of stock *as margin* to protect speculative dealings which they were carrying on in lieu of a deposit of cash as is usually re-

quired. None of the customers at the time they gave orders for the brokers to purchase stock for them paid for the stock in full.

At the time of the deposit of certificates as margins, the respondents were given receipts or received notices practically identical in form, containing the conditions upon which Berry & Company accepted the deposit of the stock certificates, and upon which they were willing to execute the customers' marginal orders.

The receipt accepted by the respondents at the time they opened their speculative accounts and deposited their stock with Berry & Company is as follows:

> "Received from" (*stating the name of customer and kind of certificate*). "The same to be a *general deposit*, and this receipt is given and received with the mutual understanding that JACOB BERRY & CO. may *hold the same as margin* and as security for or apply the deposit in part payment of or on account of losses on any or all transactions in the purchase or sale of stocks, bonds, securities or commodities made by them for your account.
>
> This receipt is given and received upon the further understanding and agreement in consideration of JACOB BERRY & CO. executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally by telegraph or telephone; that the said JACOB BERRY & COMPANY may *repledge, rehypothecate or loan* any or all of said stocks, bonds, securities or commodities held by them on account thereof *as margins or otherwise; may substitute similar stocks, bonds*, securities or commodities therefor, and that said JACOB BERRY & CO. may *without notice*, upon the approximate exhaustion of margins, sell or buy, as the case may be, any stocks, bonds, securities or commodities bought or sold or held by them as collateral or margin,

> or otherwise and that in case of contracts for future delivery that said JACOB BERRY & COMPANY may close the same by purchase or sale, as the case may be, without notice, provided, however, that such purchases or sales be made either upon the Consolidated stock & Petroleum Exchange of New York, The New York Stock Exchange, the Chicago Board of Trade, or in any other Exchange in the City of New York where such stocks, bonds, securities are dealt in.
>
> (Sgd) JACOB BERRY & Co."

The condition of affairs, therefore, is that instead of depositing the regular cash margins, these customers deposited certificates of stock as margin, pursuant to the terms and conditions of the receipt, and Berry & Company immediately thereafter executed for their customers' orders.

The trustees contended that cash delivered to the broker as margin was in part payment of the stock which the broker was to purchase, and the title to such money passed to the broker as soon as delivered by the customer, and the Circuit Court of Appeals in its opinion concedes this proposition. The trustees followed this contention by asserting that stock deposited *in lieu of cash as margin* (the condition here), places the stock deposited in the exact position of cash, namely, as the purchase price of any stock which the broker later bought on the customer's account, and the title to this purchase price which happened to be a certificate of stock instead of a Treasury certificate of the United States Government, passed to the bankrupt broker. It is here that the parting of the ways occurred between the trustees and the Court.

The result is that a customer who has deposited certificates as margin receives all, while the customer who deposits cash receives nothing. We have the anomaly of a judicial decree declaring

that the difference between a certificate of stock and cash is sufficient to change the relation of the parties who handle them, so that in one case the relation of pledgor arises, while in the other case the relation is that of creditor. The Court below has ignored the broad powers of disposition granted to the broker by the customer, the stipulated right on the part of the broker to pledge the certificates, to substitute other certificates and to sell without notice. In the face of these facts the Court has found that the relation which existed between the broker and customer is that of pledgor and pledgee, because the New York Court of Appeals had used such terms to describe the relationship years ago, although by its later decisions it has so modified the original finding as to destroy the substantial requirements of the relationship while preserving the words themselves as mere hollow terms without a meaning.

One of the respondents, George E. Hall, filed a proof of claim in bankruptcy in which he included the value of the certificate of stock which he seeks to recover in this proceeding (*fol. 143*), and participated in an actively contested election for trustee (*fols. 144, 452*). In the proof of claim which he filed, he stated that he did not waive any right to recover the certificates (*fols. 471, 472*).

The amount of cash balance owing to George E. Hall was but $250, while the value of the stock in the hands of the receiver in bankruptcy for which he proved was $1,600 (*fol. 144*). In other words, he was entitled to a voice to the extent of $250 at the first meeting of creditors, had he then assumed the position which he does now, of owner of the certificates. Instead, on the theory that he was a general creditor Hall influenced the election to the extent of a claim of $1,600 greater than he was entitled to in view of his present position.

The District Court with some hesitation decided that Hall had not made an election, and that he could both participate in the selection of a trustee upon a claim based in the major part upon the value of the certificates and also recover the certificates from the hands of the trustees (*fol. 194*).

The effect of the decision of the Court of Appeals is to direct that $11,610.87 or its equivalent shall be paid to five persons to the exclusion of the 1,400 other creditors of the bankrupt estate.

Reasons for the granting of a Writ of Certiorari.

(1) THERE IS A CONFLICT BETWEEN THE TWO CIRCUIT COURTS OF APPEALS.

The *first* Circuit holds that in speculative marginal dealings, the relation between the customer and the broker is that of debtor and creditor.

In re Swift, 100 Fed. Rep., 319.

This ruling is in accord with the doctrine which governs in Massachusetts and England.

Covell vs. *Loud, 135 Mass., 41.*
Chase vs. *Boston, 180 Mass., 458.*
Benlinck vs. *London Bank, L. R., 2 Ch. Div., 120, 140.*

This Court has in effect expressed its approval of the view of the First Circuit when passing upon the question as to whether certain debts were dischargable in bankruptcy. It is held that a broker does not bear a fiduciary relation to his customer, but that the relation is merely a contractual one, namely that of debtor, in all speculative dealings, whether in reference to the stock deposited as collateral to protect an account, or in reference to the

stock purchased by the broker on customers' marginal orders.

Hennequin vs. *Clews, 111 U. S., 676.*
Crawford vs. *Burke, 195 U. S., 176.*
Upshur vs. *Briscoe, 135 U. S., 365.*

The *second* Circuit holds that in speculative transactions the title to the certificate is in the customer, and the broker is but pledgee with a right to hold until his advances are paid.

Richardson vs. *Shaw, 147 Fed. Rep., 659.*
See opinion attached to petition affirming the District Court in this case.

This ruling, as will be seen from the opinion in *Richardson* vs. *Shaw*, is founded on the doctrine enunciated in *Markham* vs. *Jaudon* (*41 N. Y., 235*).

It is the undoubted right of this Court in determining questions governing mercantile transactions and business relations in general to construe contracts in accordance with general commercial law, and in accordance with the Court's sense of justice.

Swift vs. *Tyson, 10 Peters, 1.*

The Bankruptcy Statute is a Federal Law whose only purpose is to distribute equally to all creditors the assets which remain in the hands of an insolvent. The Federal Court should not adopt a construction which will defeat the intention of this law, but should exercise its own individual judgment so as to make one harmonious, general system of bankruptcy applicable to all cases. The Federal Courts should not protect one customer as against all others merely because this customer deposited a certificate of stock as margin, while all the other

customers deposited cash as margin. The result is a preference pure and simple, a subtraction from the funds of the bankrupt estate of over $11,000.

The only case cited by the Court of Appeals in its opinion in this case is *Richardson* vs. *Shaw* (*147 Fed. Rep., 659*). This Court in October last, granted a writ of certiorari to consider the ruling there made and in view of the similarity between the cases, in view of the fact that both passed upon the same question, and in view of the fact that both involved the relation between a broker and his customer, the one in reference to the marginal purchase, and the other in reference to the collateral margins, this case should also be considered by this Court.

A conflict of this sort, upon a question vital to the entire community who buy and sell stocks, between the two Circuit Courts of Appeals is a ground for a writ of certiorari.

Forsyth vs. *Hammond, 166 U. S., 506.*

(2) THE NEW YORK DOCTRINE IS UNSOUND, AND THEREFORE AN IMPROPER GUIDE FOR THE FEDERAL COURTS.

The history of the doctrine of *Markham* vs. *Jaudon* (*supra*), shows it to be unsound, and the inconsistencies in which it has involved the New York Courts are eloquent of the inexpediency of adopting it in the Federal Courts. The opinion contains a powerful dissent by a portion of the Court, is criticized in the same term of Court at which it was decided (*Morgan* vs. *Jaudon, 40 How. (N. Y.), 246*), and is expressly overruled in part in *Baker* vs. *Drake* (*52 N. Y., 217*). RAPALLO, *J.*, using these words :

> "It seems to me after as full examination of the subject as circumstances have per-

mitted that the dissenting opinions embody the sounder reasons."

When the question next came before the Court there is again a dissent (*66 N. Y., 518*), and the decisions of

Hanks vs. *Drake, 45 Barb.* (*186*).
Sterling vs. *Jaudon, 49 Barb.* (*459*).
Schoeppler vs. *Eisner, 3 Daly* (*11*),

all decided in the State of New York, are directly in opposition.

The case, so far as it decided that the broker holds stock as a pledge, is to all intents and purposes repudiated.

Caswell vs. *Putnam, 120 N.Y., 153.*

This case has decided that a broker satisfied his full duty to his customer when he is in a position to deliver a certificate to the customer when the customer pays the balance due, and that the broker does not need to carry any one specific certificate for his creditors. Certainly, the essence of a pledge is destroyed by this decision. The law of pledges requires that there shall be a specific thing pledged, the title to which is in the pledgor, with a duty on the part of the pledgee to return this specific thing at the demand of the pledgor.

Caswell vs. *Putnam* (*120 N. Y., 153*) does not require that there be a specific certificate of stock for the customer kept by the pledgee broker, and simply placed a duty upon the broker to be in a position to deliver any certificate of like kind which the broker may chose, whenever the customer shall pay for it in full. To call such a relationship that of pledgor and pledgee is a misnomer. Mere words cannot change the actual legal status.

In re Swift (*C. C. A. First Cir.*), *105 Fed. Rep., 493.*

The doctrine is opposed to the better considered cases of Massachusetts and England, and to the ordinary, every-day business usage of stockbrokers. The practical situation, separated from legal fictions, is clearly that the margin is but part payment of the purchase price of stock, in effect, an installment on the purchase price, and when, as in any other contract, it has been paid for in full, the broker delivers the certificate. Without the decision of *Caswell* vs. *Putnam*, but one broker in a hundred would have sufficient funds to transact a large business. The deposit of the ordinary 10% margin would require that a broker be in a position to loan 90% on all stock purchases made by him, and keep on hand the specific certificate. Such, it is maintained, is the only way that a broker could fulfill his relation as pledgee. This would require an almost prohibitive amount of capital.

(3) THE SECOND CIRCUIT INCORRECTLY INTERPRETED THE NEW YORK LAW WITH REFERENCE TO THE FACTS INVOLVED.

All that *Markham* vs. *Jaudon* (*supra*), decided was that a speculative transaction between a broker and customer, in *the absence of any express contract, creates the relation of pledgor and pledgee.*

The case at bar is not an ordinary speculative contract, but is a special contract, full and explicit in terms, in which the customer and broker define clearly their relationship. Under the very New York law which the Court of Appeals followed, it has been held that where stock is deposited with a broker with the authority to "use, transfer and hypothecate the same" no action for conversion can lie, that the ordinary action on contract must be maintained.

Ogden vs. *Lathrop*, *64 N. Y., 158.*

The New York doctrine of pledgor and pledgee, if the cases are examined, will be found to relate only to a case where a broker *does unauthorized and wrongful acts.* It should not be invoked in a case where a broker carries out his contract with a customer.

The contract made by the customer provided :

(1) That the stock delivered was to be regarded as a "general deposit" in a speculative account (*fol. 387*).

(2) The bankrupt brokers were expressly authorized to "*hold same as margin*" (*fol 387*).

(3) There is express authority given "to repledge, rehypothecate or loan any or all of said stocks, bonds, securities or commodities held * * * on accounts pledged as *margin or otherwise*" (*fol. 388*).

(4) The broker was permitted "to substitute similar stocks" (*fol. 388*).

(5) There is a broad provision permitting a sale of the certificates upon the approximate exhaustion of margin "without notice"; thus the customer expressly stipulating himself outside of the decision of *Markham* vs. *Jaudon*.

These provisions, even under the New York decisions, would change the relationship. The facts show that the customers did not deposit cash for margins when they opened their accounts but delivered stock certificates instead, contracting with Berry & Company that the certificates were to be a general deposit and to be regarded as margins (*fols. 387–388*).

The Court of Appeals, in its opinion in this case, concedes that money deposited as margins should be credited on the accounts of the clients, and as to

the balance in the broker's hands at any time, the clients are merely creditors. Manifestly, the margin deposited is a part of the purchase price which the broker is to use in the buying of the stocks. This purchase price, in the case at bar, took the form of certificates of stock and not money. The customer stipulated that the certificates were to be considered as margin. This certainly assimilated the stock deposited to cash, and the rule which governs cash margins should be adopted, *i. e.*, that title to the margins has passed to the broker. The stipulated right to repledge the deposited certificates changed the relationship.

Ogden vs. *Lathrop, 64 N. Y., 158.*
Chamberlain vs. *Greenleaf* (*4 Abb. New Cas.* (*N. Y.*), *176.*

The right to substitute similar certificates necessarily meant that the customers cared nothing about having the broker keep any specific property for him, but was content to have a similar thing. A pledge requires that the *identical thing* pledged shall be kept by the pledgee in order that it may be returned to the pledgor, when the conditions of the pledge are satisfied.

When there is no obligation on the part of the broker to restore the specific article, and another of equal kind can be delivered, the broker becomes a debtor to make the return and the title to the property is changed. It is a sale and not a bailment or pledge.

These are the words of MARTIN, *J.*, adapted to the present situation in *Sattler* vs. *Hallock* (*160 N. Y., 291, p. 298*). This right of substitution is at variance with the very essence of the doctrine of bailment by way of pledge, and creates a contract of sale and exchange, in which the title to the certificate passes to the broker.

Norton vs. *Woodruff, 2 N. Y., 153.*

Seymour vs. *Wycoff, 10 N. Y., 213.*
Carpenter vs. *Griffin, 9 Paige (N. Y.), 310.*
Sturm vs. *Boker, 150 U. S., 312.*

In *Seymour vs. Wycoff (10 N. Y., 213)*, MULLET, *J.*, said :

> "The rule referred to by the defendant's counsel applies only to cases, where the property, by the mixture, does in fact lose its identity and becomes incapable of specific designation ; or where by the terms of his contract, the owner parts with his property *and takes a promise of substitution.* In such a case, the owner parts with his property, as he parts with the means of identifying it or controlling ; and the person to whom it is delivered, instead of being a bailee, becomes a *debtor.*"

That these inconsistent provisions will vitiate the pledge relationship in stock brokerage becomes apparent from one of the strongest cases maintaining the doctrine of pledgor and pledgee in the State of New York.

Markham vs. *Maxwell, 53 N. Y., 19.*

In this case ALLEN, *J.*, said :

> "The authority to sell the pledge would be inconsistent with the very essence of the bailment by way of pledge, as that recognizes the general property of the bailor, and his right to redeem the thing pledged."

The difference therefore between the New York and Massachusetts theories becomes immaterial in view of the terms of this contract. The broker pledged the security on a general loan to the Hanover National Bank with the *full consent of the customer*, and this implies that the broker may not

pay up his loan, and the bank sell out the certificates. Such a state of affairs certainly shows that the customer was perfectly content to waive his title to the certificate. There is an obligation, because of the customer's consent, upon the broker, to protect the customer from the consequences of these loans. *No customer, however, could protect himself.* No one of them could require the bank pledgee to surrender his single certificate, and no one of them could force the Hanover National Bank, upon payment of what he owed to the broker, to give over one of the certificates which the bank held. The customers by act of the broker in accordance with their own consent have come into indirect relations with each other In case of insolvency, the interposition of a Court of Equity is required to adjust the rights and claims as between the broker, his clients and the general pledgee. An equity court, sitting in bankruptcy, should adopt the principle that equality is equity.

The Court of Appeals in its opinion has stated that there are two different provisions in the contract made by customers with Berry & Company, one relating to the deposit of stock, and the other to the stock purchased or sold for the client. The Court restricts to the latter class the stock which may be "pledged, rehypothecated or loaned." Such a conclusion might be drawn from one sentence of the contract, but cannot be drawn when the contract is read as a whole. At the outset it is stated that deposited stock is to be held as margin. The clause permitting repledging states that the brokers may "repledge, rehyyothecate or loan, any or all of the said stocks * * * held by them on account thereof as *margin or otherwise*" (*fol.* 388). If the deposited stock was margin, it is inconceivable why it did not come under this clause.

The situation therefore resolves itself into this:

Shall this Court permit a customer to obtain a preference merely because he deposited stock in place of money? Shall it permit him to secure a preference in face of the fact that he used the stock as an equivalent for money when he opened the account? Shall it permit him to secure a preference in the face of his contract that he was willing to have returned to him by the broker, any certificate, and not his *identical certificate*.

(4) THE FILING OF THE PROOF OF DEBT BY THE RESPONDENT HALL, INCLUDING THEREIN THE VALUE OF THE CERTIFICATE OF STOCK SOUGHT TO BE RECLAIMED FROM THE TRUSTEE SHOULD BE ADJUDGED TO BE AN ELECTION TO ADOPT THE POSITION OF GENERAL CREDITOR, AND A BAR TO ANY ATTEMPTED ASSERTION OF OWNERSHIP.

Hall proved a claim for $1,850 as a general creditor. He voted thereon for trustee at a contested election, and the claim still remains unchanged on file in the bankruptcy proceedings. Hall was entitled to a claim of $250 only if his present position of owner of the certificates is to be sustained. He therefore obtained a voice and influence in the election of trustee, far in excess of what he was entitled to.

It has been held that the proving of a claim is an election of remedies to adopt the position of general creditor, and bars a later assertion of title to property which has been included in the proof of claim, but the Court has held in the case at bar that, because Hall added a clause to his proof of claim reserving the right to recover the certificates, that he has fully protected himself, and has not made an election.

The trustee maintains that, when faced with two

concurrent remedies which are inconsistent, Hall was forced to elect once for all.

Mills vs. *Parkhurst*, *126 N. Y.*, *89*.
Terry vs. *Munger*, *121 N. Y.*, *161*.

Hall attempted to both ratify the conversion of his stock and prove a claim for its value, and at the same time rescind his transaction with the bankrupts and to recover his certificates. The importance of this question lies in the fact that it opens the door to large abuses in bankruptcy practice. It permits a creditor to gain a large measure of control over the election of the trustee, and a condition may well arise in which creditors who claim to be owners of property in the possession of the receiver in bankruptcy may, by voting their enlarged claims, secure the election of a trustee who will be favorable to their interests. The effect of the decision places the voting power in the hands of persons, who, on their own showing, are not creditors of the bankrupt, but who are adverse claimants to all the creditors of property of the bankrupt estate.

Thus persons who have hostile interests to the general creditors, can by manipulation outwit and defeat the real *bona fide* creditor. It is manifest that a trustee who would be elected under such influence would be but a poor agent to conserve the interests of the general creditors. If there is one provision which is part of the warp and woof of the National Bankruptcy Act, it is that the administration of bankrupt estates shall be in the hands of creditors, as the parties most interested in its distribution.

Under the present plan, by adding a little reservation clause, an adverse claimant may take part in the election of the creditors' trustee. Nay, he may even become, should his adverse claim be large

enough, the determining factor in this election, and thus secure the selection of his own trustee. This Court should stamp with its disapproval such a practice, and should not permit this decision to stand as a loophole for abuses.

IT IS SUBMITTED THAT A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respectfully submitted,

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New York City.

ABRAM I. ELKUS,
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Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1907.

EDWARD S. THOMAS, LLOYD M. HOWELL and ASHBEL P. FITCH, Trustees in Bankruptcy of Jacob Berry and Harold L. Bennet, individually, and as Jacob Berry & Company,

Petitioners,

AGAINST

ANNA D. TAGGART, and others,

Respondents.

BRIEF FOR RESPONDENT, ANNA D. TAGGART.

Statement.

This case comes before the Court on a writ of certiorari issued to the Circuit Court of Appeals for the Second Circuit (p. 100) to review a decision of that Court affirming an order made October 23, 1905, by the District Court for the Southern District of New York directing the petitioners as Trustees in Bankruptcy of Jacob Berry & Company, among other things, to deliver to the respondent, Anna D. Taggart, certificate No. C15,546 for

fifty shares and certificate No. A30,563 for thirty-three shares of preferred stock of the United States Steel Corporation (pp. 38-40). These certificates of stock both stand in the name of Anna D. Taggart, and were delivered by her to Berry & Company on or about September 15, 1904 (pp. 59, 63; Exhibit A, p. 74). Berry & Company subsequently pledged the certificates, together with other securities, to the Hanover National Bank, as collateral to a loan. Upon the failure of Berry & Company on November 26, 1904, the bank sold the greater part of the securities, but not these two certificates, and after paying the loan with the proceeds of sale returned these two certificates, with the other unsold securities, to the trustees in bankruptcy (pp. 93, 94).

Mrs. Taggart was a customer of Berry & Company at the time of their failure, having maintained with them from January, 1903, an account for the purchase and sale of stocks and other securities on margin (pp. 57, 58). Upon the failure of Berry & Company on November 26, 1904, her account was closed out; that is to say, all the securities which Berry & Company had purchased and were then carrying for her account were entered in her account as sold at prices prevailing on November 26, 1904. The eighty-three shares of Steel preferred stock which Mrs. Taggart had delivered to Berry & Company were not entered as sold, but were entered as collateral security left on hand. The proceeds of the securities thus sold exceeded by $841.03 the amount which Mrs. Taggart would have been obliged to pay Berry & Co. before the sale in order to take up all the securities then held by Berry & Co. for her account. Accordingly, at the close of business on November 26, 1904, Mrs. Taggart had a credit balance of $841.03 and eighty-three shares of Steel preferred stock on hand as collateral. See statement of

Mrs. Taggart's account with Berry & Company from October 31 to November 26, 1904, marked "Exhibit B," and printed opposite page 74 of the record, which was furnished to her by the Trustees (p. 58). The word "call." after 83 U. S. S. Pfd. in the second and last lines is a misprint for "Coll.," meaning "collateral."

Subsequently, to wit, on January 30, 1905, Mrs. Taggart tendered to the Trustees the sum of $10,638.69, the amount which Mrs. Taggart would have been obliged to pay Berry & Co. before the sale of November 26 in order to take up all the securities then held by Berry & Co. for her account, with interest, and demanded the delivery to her of all said securities, both those which Berry & Company had purchased for her account and also the eighty-three shares of Steel preferred stock which she had delivered to Berry & Company. This tender and demand were refused by the Trustees (pp. 73-74).

The only question in this case is whether the transaction by which Mrs. Taggart delivered to Berry & Company the two certificates of Steel preferred stock on September 15th was a sale of the stock by Mrs. Taggart to Berry & Company, or merely a pledge of the stock to protect Berry & Company against losses which they might sustain through purchasing, selling or carrying securities for Mrs. Taggart's account; or, in other words, did Mrs. Taggart transfer to Berry & Company all her right, title and interest in the stock, or did she merely give them a lien on the stock for a certain purpose, retaining the general ownership, and the right to redeem the stock when the purpose of the lien had been accomplished? If the transaction was a pledge of the stock as security, then, unquestionably, the order of the District Court, and the decision of the Circuit Court of Appeals affirming said order, were correct, because Mrs. Taggart's

indebtedness to Berry & Company has been paid, the purpose of the pledge has been accomplished, and Berry & Company's lien has been satisfied and discharged. The Trustees, of course, have no greater or better right or interest in the stock than Berry & Company themselves had.

The circumstances under which Mrs. Taggart delivered the two certificates of steel preferred stock to Berry & Company are not stated fully or accurately in the Trustees' brief, the Trustees assuming, without justification, as we claim, that the nature of the transaction, like those under which the other respondents delivered securities to Berry & Company, is to be determined by the printed provisions of Exhibit C, the receipt given her for the stock. The circumstances, as shown by Mrs. Taggart's uncontradicted testimony, were as follows:

Berry & Company had their main office in the City of New York, and a branch office in Philadelphia (p. 16). The manager of the Philadelphia office was George M. Davis, through whom Mrs. Taggart had given most of her orders for the purchase and sale of stocks prior to September 14, 1904 (pp. 57, 61, 62). On that day, Berry & Company were not carrying any securities for her account, having sold on September 6th and 12th, respectively, the twenty shares of stock which they were carrying on September 1st (see statement of her account from September 1st to October 31st, 1904, marked "Exhibit A," and printed opposite page 74). The proceeds of the sale of these stocks exceeded by about $150 Mrs. Taggart's debit balance to Berry & Company, and gave her a credit balance (Exhibit A).

On or about September 14th, Mrs. Taggart being temporarily in New York City, called at the New York office of Berry & Company, apparently for the purpose of making some arrangement for further transactions, and had a

conversation with Mr. Coakley, manager of that office (p. 59). She stated to him that she would like to make some more money. He suggested that if she had some stock and would give it to Berry & Company they would make some money for her. She then told him that she had some steel shares, and he said, "Very well, we will try and make you a nice profit." He told her that if she would give them this stock it would be *just as safe in their possession* as it was in her box at the Pennsylvania Company, and that he would make her a nice lot of money. He told her that stocks were going up, and strongly advised her to put it in their hands, saying that *she could get it at any time;* that *she could have the shares at any time* (pp. 59, 60, 61, 64, 67, 68). He was so particular about it that he said: "Now have Mr. Davis go down to the bank with you and secure—take the certificates up with him,"—meaning that Mr. Davis would accompany her (p. 64). Mrs. Taggart took it for granted that Berry & Company would buy stocks for her. Coakley said that Davis would tell Mrs. Taggart the kind of stocks which would be likely to rise and that Davis would then buy them for her (p. 65).

Mrs. Taggart returned to Philadelphia that same day, and the very next day she went to her safe deposit box, took out the two certificates of steel preferred stock—one for fifty shares, numbered C15546, the other for thirty-three shares, numbered A30563—took them to the Philadelphia office of Berry & Company and delivered them to Mr. Davis (pp. 59, 60). In the meantime Coakley had telephoned over to Davis from New York, so that Davis knew that Mrs. Taggart had seen Coakley and was coming with the stock (p. 67). Davis asked Mrs. Taggart to sign her name on the back of the certificates, which she did (p. 66). Davis then went to his desk, took one of Berry & Com-

pany's printed forms of receipt, wrote Mrs. Taggart's name and a description of her stock, giving even the numbers of her certificates, in blank spaces left therefor, wrote across the printed matter on the face of the receipt the words, "As Collateral on Account," signed the receipt "George M. Davis, Manager," and then delivered it to Mrs. Taggart (p. 65, Exhibit C). This receipt is printed on page 76, but for a better understanding of the nature of the document we ask the Court to examine the original, which will be presented upon the argument.

Mrs. Taggart had no conversation with Davis about the purpose of the delivery of the stock (p. 67). Nothing was said, either in her interview with Coakley or in her interview with Davis, about the certificates being repledged, rehypothecated or loaned, or about their leaving the possession of Berry & Company for any purpose (pp. 59, 60, 67). Mrs. Taggart supposed that the stock would remain in Coakley's possession or that of the firm (p. 59).

Mrs. Taggart did not read the small printed matter on Exhibit C beginning with the words, "The same to be a general deposit," and ending with the words, "commodities are dealt in," until after the failure of Berry & Company (p. 60). She simply took it, folded it up and put it in her bag (p. 65). She noticed that it was signed and that it referred to her eighty-three shares of Steel preferred stock (p. 66). Beyond this, she had no knowledge of its contents until after the failure of Berry & Company (pp. 65-66). She accepted the receipt "the same as she would for a bill paid, or anything of the kind" (p. 60).

Berry & Company entered this transaction in Mrs. Taggart's account under date of September 15th as "83 U. S. S. Pfd. Recd." without crediting Mrs. Taggart with any particular amount of cash, as they did in the case of a sale of securities or a

deposit of cash as margin (see Exhibit A, 5th line, opposite p. 74).

On subsequent occasions, to wit, on October 31st, November 25th and November 26th, Berry & Company entered this stock in her account as "83 U. S. S. Pfd. Coll.," thus expressly distinguishing it from twenty other shares of U. S. Steel Preferred which they had bought and were carrying for Mrs. Taggart's account (Exhibit B. The word "call" after "83 U. S. S. Pfd. is a misprint for "Coll.," meaning collateral).

After delivering her eighty-three shares of steel preferred stock to Berry & Company, Mrs. Taggart, upon the suggestion and advice of Coakley or Davis, gave Berry & Company further orders for the purchase and sale of stocks for her account, without furnishing any further securities or cash as margin (pp. 68, 69, Exhibit A).

Mrs. Taggart received from time to time through the mail, from Berry & Company, bought and sold notices which were made out on printed forms, advising her of the amount and description of stock bought or sold for her account, the price paid or received, etc. These notices contained printed matter somewhat similar to, but not identical with the printed matter on Exhibit C (pp. 70-71). Mrs. Taggart never read any of the printed matter on these notices and never had any knowledge of their contents until after the failure of Berry & Company (pp. 71-72).

The trustees argue in substance:

1. That Exhibit C was delivered and accepted as a contract governing the delivery of the Steel stock to Berry & Company and that by the provisions of that document the transaction was a sale of the stock and not a pledge as collateral security.

2. That Mrs. Taggart delivered the Steel stock to Berry & Company as margin *in lieu of cash;*

that the stock should be treated the same as cash would be treated, and that as the title to cash passes on payment, so also the title to this stock passed on delivery.

3. That Berry & Co. actually applied the Steel stock *as cash* to the purchase of securities for Mrs. Taggart's account.

4. That the relation between Mrs. Taggart and Berry & Company, with reference to the securities purchased and carried on margin, was debtor and creditor, Berry & Company being the owner of the securities; that the same relation exists, with reference to the Steel stock delivered by Mrs. Taggart to Berry & Company, and that Berry & Company became the owners of the stock on delivery.

5. That it is contrary to the spirit of the Bankruptcy Act and operates as a preference to permit Mrs. Taggart, who delivered stock as margin, to recover all, when the other customers, who delivered cash as margin, can recover only a dividend as general creditors.

We shall argue:

1. That Exhibit C was not delivered or accepted as a contract governing the delivery of the Steel stock to Berry & Company; that the contract governing this delivery was made with Coakley in New York and that under that contract the transaction was not a sale but merely a pledge as collateral security.

2. That even if Exhibit C had been delivered and accepted as a contract governing the delivery of the Steel stock to Berry & Company, still, under the provisions of that document, the transaction was not a sale but merely a pledge as collateral security.

3. That Mrs. Taggart did not deliver her Steel

stock to Berry & Company under such circumstances that it must be treated the same as cash and that Berry & Co. never treated it *as cash* or applied it to the purchase of securities for Mrs. Taggart's account.

4. That it makes no difference whether the relation between Mrs. Taggart and Berry & Company, with reference to securities purchased and carried on margin, was debtor and creditor or pledgor and pledgee, there being no reason to hold that the same relation must exist with reference to the Steel stock delivered by Mrs. Taggart to Berry & Company.

5. That the relation between Mrs. Taggart and Berry & Company, with reference to securities purchased and carried on margin, was pledgor and pledgee, and not debtor and creditor.

6. That the redelivery of the Steel stock to Mrs. Taggart is not contrary to the spirit of the Bankruptcy Act and is not a preference.

POINT I.

Exhibit C was not delivered or accepted as a contract governing the delivery of the Steel stock to Berry & Company. The contract governing this delivery was made with Coakley in New York. Under that contract the transaction was not a sale but merely a pledge as collateral security.

The substance of the arrangement made by Mrs. Taggart with Coakley in the conversation at the New York office was that she should deliver to Berry & Company her Steel stock, that Berry &

Company would purchase, carry and sell securities for her account, and by giving her "tips" when and what to buy and sell, they would make some more money for her; that in the meantime they would keep her stock *safely in their possession,* and if the subsequent transactions were profitable, ultimately return to her the identical certificates received. Upon this much of the arrangement there seems to have been a clear understanding between the parties. Mrs. Taggart confidently expected that her subsequent transactions would be profitable, and she accordingly "never dreamed of her eighty-three shares being touched at all" (p. 69). She apparently did not consider what would happen to her eighty-three shares if the transactions were unprofitable. Coakley, however, intended, and under the circumstances had reasonable ground to believe, that Mrs. Taggart intended Berry & Company to look to this Steel stock for their indemnification in case her subsequent transactions were unprofitable. It is clear, however, that neither Mrs. Taggart nor Coakley intended that all her right, title and interest in the Steel stock should pass to Berry & Company. All Coakley wanted was to induce Mrs. Taggart to continue her transactions and to obtain for Berry & Company security against loss.

In the ordinary case of a deposit by a customer of securities as margin, Berry & Company wished to obtain the rights to repledge, rehypothecate, loan, substitute and sell without notice on approximate exhaustion of margin, but Coakley, in order to overcome Mrs. Taggart's timidity in delivering her property to them, evidently intended to make this a special case by agreeing to keep her stock safely in Berry & Company's possession and ultimately give back to her the identical certificates received, in case her subsequent transactions were profitable.

If Mrs. Taggart had then and there taken the certificates from her pocket and delivered them to Coakley, with or without obtaining a receipt for the same, there can be no doubt that the transactio would have been a plain and simple case of a common law pledge of personal property to protect the pledgee against loss and that the rights of the parties would have been nothing more or less than those of pledgor and pledgee at common law. When Mrs. Taggart left his office there remained nothing for her to do but to get her certificates in Philadelphia and deliver them to Davis at the Philadelphia office. She would then be in a position to continue her transactions, and, as she hoped, make some more money.

When we bear in mind the arrangement made in New York and that Mrs. Taggart delivered her certificates to Davis, and Davis gave her Exhibit C the *very next day*, without a word as to the purpose of the delivery, without a word of inquiry or comment on either side, and that Coakley had notified Davis by telephone that he had seen Mrs. Taggart in New York and that she was coming to deliver the stock, the inference is irresistible that the stock was delivered and received in Philadelphia in pursuance of the arrangement made in New York; that Mrs. Taggart had no intention or desire to change in any way the arrangement she had made with Coakley, and that Davis had no intention or desire of making any *new* arrangement with Mrs. Taggart, but that he was acting merely under instructions from his home office. In other words, Exhibit C was given and accepted *as a receipt* for the stock as collateral security and not as a contract.

This view is confirmed by the fact that Davis *substantially changed* Berry & Company's printed form of receipt by writing across the face of the paper, in ink, the words "As collat-

eral on account." Why should he have done this unless instructed by Coakley to receive the stock merely "as collateral on account"? If Berry & Company had desired or expected in this case, as in the ordinary case of a delivery of securities as margin, to acquire the rights to repledge, rehypothecate, loan, substitute and sell without notice on approximate exhaustion of margin, why should Davis have made this change in the receipt? We must attribute some purpose to his act. He used the regular form of receipt but changed it so as to suit this case, which he evidently regarded as a special case different from the ordinary case of a delivery of margin by a customer.

The words written in ink across the face of the paper are most important in determining the nature of the instrument. They are deemed to show the final intention of the parties and by well-settled rules of law supersede and prevail over the printed matter in the interpretation of the instrument.

Hagan v. *Scottish Ins. Co.*, 186 U. S., 423.

Kratzenstein v. *Western Assurance Co.*, 116 N. Y., 54, 57.

In the first case cited, Mr. Justice Peckham in interpreting an insurance policy, applied (pp. 428, 429)

> "the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract beween the parties. * * * If there be any inconsistency between the written provision of the policy and the printed portion thereof, the written language must prevail."

In the second case cited, the Court of Appeals of New York stated the rule as follows:

> "Where a contract contains two repugnant provisions, the one printed and the

other written, it is well settled that the latter must control the interpretation of the instrument, as it is presumed to express the latest intention of the parties."

It is clear, beyond question, that Mrs. Taggart had no idea of making any arrangement or contract with Davis changing in any way the arrangement she had made with Coakley. Even if Davis had delivered Exhibit C to her as a contract with the desire of committing her to its provisions, his purpose was not accomplished. Her attention was not called to any of the provisions of the document. She did not read any of them at the time or afterwards, until after the failure of Berry & Company. She had no reason to expect that Davis would give her any document except a simple receipt for her stock, pursuant to the arrangement made with Coakley. As an intention to contract is essential to the making of a valid contract, and mere silence is not, except under extraordinary circumstances, sufficient to indicate such an intention, it is clear that she did not become committed to any provisions of Exhibit C as a contract. A person receiving, without knowledge of the contents, a document purporting to be a contract does not become bound by its provisions unless he knew or had reason to suppose that the document was offered as a contract.

Springer v. *Westcott*, 166 N. Y., 117.
Bostwick v. *B. & O. R. R.*, 45 N. Y., 712.
Bosoian v. *Hubbard*, 121 App. Div., 510 (Second Department, October, 1907).

In *Springer* v. *Westcott* (*supra*) the defendant's agent took from the plaintiff, a woman, the check of her trunk, with instructions to deliver the trunk at a certain address, and gave her a printed form

of receipt, which she immediately folded up and placed in her pocket, without reading. The receipt contained a limitation of defendant's liability. In an action for the value of goods lost out of the trunk, the trial Judge charged as follows:

> "If, however, you find from all the circumstances that the plaintiff did not know the paper writing in question was proffered as a contract, and received it not knowing its contents and satisfied it was given her simply to enable her to trace her property, or a mere receipt, then the plaintiff is not bound by its limitation, and you may, if you find she is entitled to recover, render a verdict in her favor for the value of the goods which you find were lost."

The Court of Appeals affirmed a judgment entered upon a verdict for the plaintiff, holding that the foregoing charge was a correct statement of the law.

In *Bosoian* v. *Hubbard* (*supra*) the plaintiff, an Armenian who was uneducated and could read with difficulty, maintained an account with the defendants who were cotton brokers. Upon the opening of the account the defendants told the plaintiff what the margin and rate of brokerage would be, and assured him that they would not close out his account without calling on him for more margin. After each purchase or sale by the plaintiff, the defendants delivered to him a memorandum of the same, made out on a printed form, which contained a provision authorizing the defendants to close transactions when margins were running out, without further notice. Plaintiff never read any of the printed matter on these memorandum slips. It was held that the original contract, not to close out his account without calling on him for more margin, was not modified by

the delivery and acceptance of the printed purchase and sales memoranda. Woodward, *J.*, said:

> "No authority has been cited in support of this theory of modification, nor have I been able to find any. If it is sound, a party to a contract may modify it by giving repeated notices of his 'modification' to the other party, provided the latter silently receives them, they being printed on slips carrying brief written memoranda made necessary by the nature of the contract. This can not be true, for there is no mutuality of agreement, which is as indispensable to the modification as well to the making of a contract."

It is clear that Mrs. Taggart accepted Exhibit C, upon which were written the number and description of her shares of stock and the exact numbers of the certificates delivered, merely as a receipt which would enable her subsequently to identify or trace her property.

POINT II.

Even if Exhibit C were delivered and accepted as a contract governing the delivery of the Steel stock to Berry & Company, still, under the provisions of that document, the transaction was not a sale but merely a pledge as collateral security.

Inasmuch as the words, "As collateral on account," written in ink across the face of Exhibit C, supersede and prevail over all printed provisions which may be inconsistent therewith, it is really

unnecessary to consider the meaning of the printed provisions. If these provisons are consistent with a delivery of the stock as collateral security, they may be operative, but still the transaction was a pledge. If any of the printed provisions are inconsistent with a delivery as collateral security they are inoperative. See cases cited in preceding point. The written words are the best evidence of the intention of the parties and a convincing admission by Berry & Company of the nature of the transaction. This admission the Trustees cannot escape by any kind of argument. However, as the trustees have considered this case in their argument and in their brief as if the delivery of the stock were governed by the printed provisions of Exhibit C, without regard to the words written across the face of it, we will consider briefly the meaning and effect of these provisions.

The provisions of Exhibit C upon which the trustees rely for their argument—that the document imports a sale instead of a pledge—are those authorizing Berry & Company to repledge, rehypothecate or loan securities, and to substitute other similar securities therefor. These provisions, when properly construed, do not apply to securities *delivered by the customer* to Berry & Company as margin, but only to securities *purchased by Berry & Company* for the customer's account and held by them as margins or otherwise. The document provides that "in consideration of Jacob Berry & Company executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone, the said Jacob Berry & Company may repledge, rehypothecate or loan any or all of *said* stocks, bonds, securities or commodities held by them on account thereof as margins or otherwise, and may substitute similar stocks, bonds, securities or commodities *therefor*." The word

"said" before the words "stocks, bonds, securities or commodities," shows that reference is made only to the stocks, bonds, securities or commodities *just previously referred to,* namely, those "purchased or sold" by Berry & Company pursuant to orders given "in writing, orally, by telegraph or telephone." The words "on account thereof" must mean on account of the purchase or sale of such stocks, bonds, securities or commodities. The words "held by them as margins or otherwise" makes the provision applicable only to the stocks, bonds, securities or commodities purchased or sold by Berry & Company *and held by them* as margins or otherwise on account of the purchase or sale of stocks, bonds, securities or commodities for the customer's account. The language contemplates that a customer may take up some of the stocks, bonds, securities or commodities purchased for his account by Berry & Company leaving others in Berry & Company's possession to be held by them as margin or otherwise on account of all the transactions. The provision for substitution clearly applies only to a substitution of similar stocks, bonds, securities or commodities for those *just previously referred to,* namely, those *purchased* or *sold* by Berry & Company and *held* by them as margins or otherwise. These provisions accordingly do not authorize Berry & Company to repledge, rehypothecate or loan any securities delivered to them by a customer as margin—such as the Steel stock delivered to them by Mrs. Taggart—or to substitute similar securities therefor. (See opinion of Circuit Court of Appeals, per Wallace, *C. J.*, pp. 97-98.)

Even if these provisions did apply to securities delivered to Berry & Company by a customer, they do not necessarily show that the transaction between the customer and Berry & Company was a sale rather than a pledge. The use of the words "*re*pledge and *re*hypothecate" indicates that the

transaction under which Berry & Company obtained the securities was a pledge or hypothecation. The authority extends to a pledge or hypothecation only for the purpose of raising money to replace that applied by Berry & Company to the purchase of securities for the customer's account. It would be an extreme construction to hold otherwise, as there is no reason why a customer should give Berry & Company power to pledge his securities in order to raise money for other customers or for Berry & Company's own purposes.

The power to repledge or loan securities or to substitute other securities therefor is not inconsistent with a pledge. A pledgee may well desire such powers for convenience in holding the pledged securities or to render them more useful and valuable to him as collateral, and a pledgor may of course confer such powers, without transferring to the pledgee all his right, title and interest in the securities.

If the securities were loaned or repledged, the right of the pledgee to recover or redeem the securities from the loan or pledge would take the place of the securities themselves and become the *res* of the pledge. Similarly, if the pledgee substituted other securities therefor, the substituted securities would take the place of the original securities as the *res* of the pledge. So long as the original securities are held by the pledgee they must be deemed the *res* of the pledge. The power to substitute does not include power to dispose of the securities *without substituting* others therefor. Such disposition of the securities would, of course, be in direct contravention of the power of substitution.

The difference between a bailment and sale is well understood. If the property delivered is ultimately to be returned in the same or a different form, or if its product or proceeds are to be returned, then the transaction is a bailment. It is

only when something other than the property delivered or its product or proceeds may be returned that the transaction becomes a sale.

Powder Co. v. *Burkhart*, 97 U. S., 110, 116.

Sturm v. *Boker*, 150 U. S., 312, 329, 330.

Mallory v. *Willis*, 4 N. Y., 76 (distinguishing *Horton* v. *Woodruff*, 2 N. Y., 153, on the ground above stated).

Stewart v. *Stone*, 127 N. Y., 500.

Sattler v. *Hallock*, 160 N. Y., 291.

The case of *Ogden* v. *Lathrop*, 65 N. Y., 158, did not involve the relation existing between a broker and customer. The decision merely holds that when one party gives property to another party with power to "use, transfer or hypothecate the same," he cannot hold the other party liable for a conversion, if he disposes of the property pursuant to the power given. There was no occasion to determine any question of title to the property.

The provision in the latter part of Exhibit C—that Berry & Company "may, without notice, upon the approximate exhaustion of margins, sell or buy, as the case may be, any stocks, bonds, securities or commodities, bought or sold or held by them as collateral or margin or otherwise"—is of course no indication of a sale rather than a pledge.

On the contrary, it indicates a pledge because it shows that Berry & Company were to *hold* the securities *as collateral* or *margin* and were *not* to sell until "approximate exhaustion of margin."

The provisions contained in the first paragraph of Exhibit C relate only to the securities delivered by the customer to Berry & Company. They provide specifically that Berry & Company may hold the securities "as mar-

gin and as *security* for, or *apply* the same in part payment of, or on account of, *losses* on any or all transactions in the purchase or sale of stocks, bonds, securities or commodities made for the customer's account." There is nothing magic or obscure about the word "margin." It means here nothing more than "security." Figuratively speaking, the margin is the difference between the value of the securities held by the broker and the amount which the customer must pay in order to obtain them. In a concrete or literal sense, margin means cash or any security which the customer may give the broker to protect him against loss on the customer's transactions. If the customer gives cash as margin, he reduces *pro tanto* the amount which he must pay in order to obtain the securities held by the broker for his account. If he gives securities as margin, he increases *pro tanto* the value of the securities held by the broker for his account. In either case, the effect is to increase the figurative margin.

See

Hopkins v. *O'Kane*, 169 Pa., 479.
Taylor's Estate, 192 Pa., 304.

The provisions authorize Berry & Company to apply the deposit "in part payment of, or on account of, *losses* on transactions" for the customer's account. The argument of the trustees that it authorizes the application of the deposit to the payment of the purchase price of securities purchased for the customer's account, is little short of ridiculous. The language cannot reasonably be construed to have this meaning. They argue that it authorizes application of the deposit "in part payment of * * * transactions in the purchase or sale of stock." This would certainly be an unusual form of expression. That Berry & Company never in fact made any such application of the securities,

is pointed out under Point III. The provisions in the first paragraph of Exhibit C, when properly construed, are affirmative indications that the securities deposited were to be held by Berry & Company merely "as security" and not as their own property.

If the printed provisions of Exhibit C, when taken together, gave to Berry & Company all the rights in and powers over the deposited securities which an absolute owner would have, there might be some ground for the trustees' argument that the effect of a delivery under this document was to make Berry & Company the owner of the securities. But such is not the case. Each right or power conferred is limited in its scope. The power to apply the securities is limited to an application to losses on transactions for the customer's account. The power to substitute is limited to the substitution of similar securities. The power to sell, without notice, is limited, both in time and place. The power cannot be exercised until the customer's margin is approximately exhausted, nor at any place, except certain enumerated stock exchanges. If Berry & Company became the absolute owner of the securities, they would, of course, have the right to apply the same to any purpose, substitute for the same any securities, whether similar or dissimilar, and to sell, without notice, to anybody, at any time and at any place. How can any person, whose powers over and rights in property are so limited, be deemed the owner? The bare fact that these rights and powers are specifically mentioned shows that Berry & Company was not intended to become the owner. No person of any intelligence would have worded a document as this one is worded if he intended it to have the effect of making Berry & Company the owner of securities delivered under it.

POINT III.

Mrs. Taggart did not deliver her Steel stock to Berry & Company under such circumstances that it must be treated the same as cash. Berry & Company never treated the stock as cash and never applied it to the purchase of securities for Mrs. Taggart's account.

There is no evidence whatever to sustain the absurd contention made by the trustees that Mrs. Taggart delivered the Steel stock to Berry & Company under such circumstances that it would have been treated the same as cash paid as margin. They say that because Mrs. Taggart did not pay cash, but did deposit securities, therefore the securities must be treated the same as cash. The trustees do not seem to see the difference between securities and cash. If one man is indebted to another, he can extinguish the debt by the payment of cash, but cannot extinguish it by the delivery of securities, even of a much greater value than the amount of the debt, unless the creditor agrees to accept them *as* payment. The question of how they are received depends upon the intention of the parties.

Berry & Company had no idea of treating, and did not treat Mrs. Taggart's Steel stock as cash. They entered it in her account as "83 U. S. S. Pfd. Recd." on the day when it was received, and on subsequent days entered it as stock on hand or as collateral. If they had received the stock as cash they would have credited Mrs. Taggart with the amount of cash as which it was received, and they would not have had any occasion to mention the stock again in the account.

The fact that Berry & Company entered Mrs. Taggart's 83 shares of steel preferred stock in her account on November 26th, 1904, the day of the failure, as collateral left on hand, is conclusive evidence that Berry & Company never applied this stock to the purchase of any securities for Mrs. Taggart's account. If they had made any such application of the stock, they would have made it at the time when they purchased securities for her account and would have credited her with the amount of cash as which it was applied. The last securities purchased for her account were purchased on October 26th, almost a month prior to the pledge of the securities to the Hanover National Bank, as part of the collateral to the loan for $45,000 made by Berry & Company on November 25th. It is ridiculous to supose that this loan was made for the purpose of raising money to pay for stock bought for Mrs. Taggart a month previous. Furthermore, the pledge of the stock as collateral to a loan could not be held an application of the stock to the purchase of securities for her account. The trustees' argument immediately invites the questions, how much of the 83 shares of stock were applied to the purchase of securities for Mrs. Taggart's account, how much credit she thereby became entitled to receive from Berry & Company, and when was the application made. There is no evidence in the case to answer any of these questions. If such an application had been made, the stock would no longer be in Berry & Company's possession. The fact that it was left in their possession, or, rather, came subsequently into the trustees' possession as the successors to Berry & Company, is conclusive against such an application.

POINT IV.

It makes no difference whether the relation between Mrs. Taggart and Berry & Company, with reference to securities purchased and carried on margin, was debtor and creditor or pledgor or pledgee, there being no reason to hold that the same relation must exist, with reference to the Steel stock delivered by Mrs. Taggart to Berry & Company.

If the relation between a customer and broker, with reference to securities purchased and carried on margin, is pledgor and pledgee, as held by the courts of New York and almost every other State, the customer is indebted to the broker in the amount advanced by the broker in the purchase of securities for his account. The title to the securities purchased is in the customer. The broker holds them as security for the repayment to him of the customer's indebtedness. If the relation is that of debtor and creditor, as held the courts of Massachusetts, the title to the securities is in the broker, and he holds them subject to an obligation to deliver them to the customer upon payment to him by the customer of a certain amount of money, and the customer is under obligation to pay to the broker this amount of money and take up his securities. It is the ordinary relation existing between the vendor and vendee of personal property under an executory contract of sale. Either party may require the other to perform upon reasonable notice.

Under either rule there are securities in the possession of the broker and there is an amount of money payable by the customer. If the value of the securities depreciates and becomes less than the

amount payable by the customer, then the broker runs a risk of loss, if the customer is not financially responsible. The risk which results to the broker from a depreciation in value of the securities is exactly the same under the Massachusetts rule as under the New York rule. In order that the broker may be protected against this risk, it is proper for him to demand, and for the customer to give, some form of security. When securities are delivered by the customer to the broker as margin, the purpose is merely to protect the broker against this risk, and the nature of the transaction, whether a pledge or a sale, must be determined by the intention of the parties. If the parties intend the transaction to be a pledge there is no reason why the law should step in and say that it cannot be a pledge and must be a sale. Also if the parties intend the transaction to be a sale, as, for instance, that the securities should be accepted and treated the same as a certain amount of money,—the law should of course give effect to the intention. The technical relation between the broker and customer with respect to the securities purchased and carried for the customer's account has no bearing whatever upon their intention with respect to securities delivered by the customer to the broker, and there is no question here of choice of law between the Massachusetts and New York rules.

We contend, for the reasons given in the preceding points, that the intention of the parties in the present case, whether gathered from the oral conversation between Mrs. Taggart and Coakley in New York or by the written or printed provisions of Exhibit C, was that the Steel stock should be delivered and received merely as security to protect Berry & Company against loss on transactions for Mrs. Taggart's account, and that accordingly the transaction must be deemed a pledge.

POINT V.

The relation between Mrs. Taggart and Berry & Company with reference to securities purchased and carried on margin, was pledgor and pledgee and not debtor and creditor.

The relation between a broker and customer with reference to securities purchased and carried on margin should be determined by local law, that is, the law of the place where the transactions take place. The nature of this relation depends largely on the customs in the stock brokerage business. It would be most unfortunate if the relation between a broker and customer transacting business in New York pursuant to the customs of New York brokers should be considered that of pledgor and pledgee in the New York State courts but debtor and creditor in the Federal courts sitting in New York. The consequence of such a difference of law between two courts of concurrent jurisdiction upon a question which is the basis of transactions amounting to millions of dollars a day would most obviously be disastrous. See Burgess *v.* Seligman, 107 U. S., 20; Hiscock *v.* Varick Bank, 206 U. S., 28; *in re* Swift, 112 Fed. Rep., 375; Richardson *v.* Shaw, Opinion of Circuit Court of Appeals for Second Circuit, per Coxe, *J.*, 147 Fed., 658.

In New York and Pennsylvania, the two States in which Mrs. Taggart conducted her transactions with Berry & Company, it is held that the relation between a broker and customer with respect to securities purchased and carried on margin is pledgor and pledgee, that the customer is indebted to the broker to the amount advanced by the broker in the purchase of securities, and the

broker holds the securities purchased as security for the repayment of this indebtedness. The securities so purchased, the broker may repledge for the purpose of borrowing money to replace that advanced for the customer, but he must always hold the securities in such a manner that he or his customer can obtain possession of them upon tender or payment of the customer's indebtedness to the broker. The relation with respect to securities delivered by the customer to the broker as margin" is also pledgor and pledgee. The transaction is merely a pledge to secure the broker against loss on the customer's transactions, and when this purpose is accomplished the customer can recover his securities in specie from the broker or his trustee in bankruptcy.

Markham *v.* Jaudon, 41 N. Y., 235.
Baker *v.* Drake, 66 N. Y., 522.
Gruman *v.* Smith, 81 N. Y., 25.
Taussig *v.* Hart, 58 N. Y., 425.
Caswell *v.* Putnam, 120 N. Y., 153.
Horton *v.* Morgan, 19 N. Y., 170.
Stewart *v.* Drake, 46 N. Y., 449.
Stenton *v.* Jerome, 54 N. Y., 480.
Gillette *v.* Whiting, 120 N. Y., 402.
LeMarchant *v.* Moore, 150 N. Y., 209.
Content *v.* Banner, 184 N. Y., 121.
Kennedy *v.* Budd, 5 App. Div., 140, 143.
Tompkins *v.* Morton Trust Co., 91 A. D., 279, 280; aff'd without opinion, 181 N. Y.
Douglas *v.* Carpenter, 17 App. Div., 329.
Capron *v.* Thompson, 86 N. Y., 418.
Whitlock *v.* Seaboard Natl. Bank, 29 Misc., 85.
Rothschild *v.* Allen, 20 App. Div., 233; aff'd without opinion, 180 N. Y., 561.

Strickland *v.* Magoun, 119 App. Div., 113.
Gilpin *v.* Howell, 5 Pa., 41.
Wynkoop *v.* Seal, 64 Pa., 361.
Esser *v.* Linderman, 71 Pa., 76.
Hopkins *v.* O'Kane, 169 Pa., 478.
Van Horn *v.* Wilbough, 10 W. N. C., 347.

For fuller statement of New York law see report of Special Master (pp. 19-20).

The New York rule is adopted in every other jurisdiction where the question has arisen except alone Massachusetts.

Skiff *v.* Stoddard, 63 Conn., 198.
Brewster *v.* Van Liew, 119 Ill., 554.
Denton *v.* Jackson, 106 Ill., 433.
Cashman *v.* Root, 89 Cal., 373.
Richardson *v.* Shaw, 147 Fed., 659, C. C. A., 2nd Circuit.
In re Bolling, 147 Fed., 786, C. C. Va.
Leahy *v.* Lobdell, Farwell & Co., 80 Fed., 665, C. C. A., 6th Circuit.

The New York rule, we submit, is more sensible and practical than the Massachusetts rule and more in accordance with the conduct and presumed intention of the parties. There is no intention of either party to enter into such a contract as the Massachusetts courts imply; the transaction does not originate with the agreement by the broker to *carry* the securities for the customer. The carrying of the securities is not the essence of the transaction but is merely incidental to it. The transaction is ordinarily commenced

by the customer giving an order to the broker to purchase certain securities for his account at a certain price. The broker accepts the order and, we will presume, executes it. Up to this time nothing has been said by either party as to whether the customer is buying for speculation or for investment. The customer may not himself know; he buys the securities presumably because he thinks they are cheap or that they will rise in value. The broker asks no questions, but merely executes the order. After the order is executed, the broker ordinarily asks the customer whether he wishes to take up the securities and pay for them in full or whether he wishes the broker to carry them for him. If the customer takes up the securities and pays for them in full, that ends the transaction. If he asks the broker to carry the securities, he gives the broker either cash or other securities as margin.

Up to the time when the customer decides whether to take up the securities or to have the broker carry them, the relation is clearly that of principal and agent. The broker acts for the customer. The broker purchases the securities and the customer becomes indebted to him for the price. The indebtedness arises the very moment the purchase is made. Furthermore, as in any other case of principal and agent, the title to the securities purchased vests immediately in the customer. The broker doubtless has a right to hold the securities until the customer pays for them, and such a right is perfectly consistent with the title being in the customer. The customer having become indebted to the broker for the amount of the purchase price of the securities and the title to the securities having become vested in the customer, what is there to re-vest the title in the broker and change the customer's obligation to that of a purchaser under an executory contract of sale? What actually happens

is that the customer asks the broker to advance for him a part of the purchase price of the securities, and he leaves the securities in the broker's hands for the broker's protection. The substance of the transaction is exactly the same as if the broker delivered the securities to the customer and the customer paid for them in full and then the customer subsequently took the securities back to the broker and asked him to advance on their security a part of the price paid in their purchase.

The broker charges the customer with interest on the money advanced by him in the purchase of the securities in addition to commissions for his services as broker, and he credits the customer with all interest, dividends and other profits derived from the securities. If the securities appreciate in value, the gain is the customer's gain; if they depreciate in value, the loss is the customer's loss. The securities are wholly subject to the direction of the customer with respect to sale or other disposition. The customer has the right at any time to obtain them upon tendering to the broker the amount advanced by the broker for him. Similarly, the broker has a right at any time to demand repayment of the advances made upon tendering the securities to the customer. All these rights are similar to those of a pledgor and pledgee of personal property.

The fact that the broker ordinarily holds the securities in his own name, and thus acquires the right to collect the interest on bonds and dividends on stock and to vote on the stock, has no bearing whatever upon the question of title. It is almost the universal custom of any pledgee of securities like stock or bonds to hold them in his own name. The pledgee thus acquires some greater rights and greater protection from his pledge.

We submit, therefore, that, whether the question be governed by the local law or by general law or by common sense and reason, it must be held that

the relation between Mrs. Taggart and Berry & Company, with respect to securities purchased and carried for her on margin, was pledgor and pledgee.

POINT VI.

The re-delivery of the Steel stock to Mrs. Taggart is not contrary to the spirit of the Bankruptcy Act and is not a preference.

If the Steel stock still belongs to Mrs. Taggart or if she has a right to redeem the same from the trustee, it is clear that the re-delivery of the stock to her is not contrary to the spirit of the Bankruptcy Act and is not a preference. The spirit of the Bankruptcy Act is to apply to the payment of the bankrupt's debts the bankrupt's property and nobody's else property, and to require the trustees in bankruptcy who accidentally get possession of property of persons other than the bankrupt to surrender it immediately to the real owners.

POINT VII.

The determination of the Circuit Court of Appeals for the Second Circuit should be affirmed and the writ of certiorari dismissed, with costs.

Respectfully submitted,

THOMAS THACHER,
GRAHAM SUMNER,
EDWIN M. LAWRENCE,
Counsel for Respondent Anna D. Taggart.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1906.

EDWARD S. THOMAS, ASHBEL P. FITCH, Jr., and LLOYD M. HOWELL, Trustees in Bankruptcy of Jacob Berry & Company,

Petitioners,

vs.

ANNA D. TAGGART, HARRIS FILSON, GEORGE DONALDSON, WILLIAM C. BOWERS and GEORGE E. HALL,

Respondents.

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENTS.

I.—THE QUESTION OF LAW INVOLVED IN RICHARDSON v. SHAW, ON WHICH THE AUTHORITIES ARE IN CONFLICT, IS NOT INVOLVED IN THIS CASE.

Interpretation of *written* contracts under which respondents deposited stocks with Jacob Berry &

Co. as *security* for marginal dealings is the only question decided by the Circuit Court of Appeals or presented in this case. This appears affirmatively from the petition, which states that the printed receipts accepted by respondents stated "the conditions upon which Jacob Berry & Co. received the stock" (fols. 14, 25). An entirely different question—what contract arises *by operation of law* as to stocks *purchased* by a broker for his customer on marginal account—was involved in Richardson *v.* Shaw, recently brought to this Court by writ of *certiorari*, and in the conflicting decisions of the New York and Massachusetts courts represented by Markham *v.* Jaudon, 41 N. Y., 235, and Covell *v.* Loud, 135 Mass., 41.

In deciding this case the Circuit Court of Appeals did not rely upon Richardson *v.* Shaw, but further distinguished it, saying:

> "The claimants of the pledged stock in this case are not seeking to follow into the hands of the Trustees in Bankruptcy the proceeds of stock purchased for them by the brokers, but are seeking the proceeds of stocks which they had deposited with the brokers upon opening an account or in the course of dealings for speculative purposes."

All the stocks involved in this case were *deposited* with Jacob Berry & Co. *as collateral* for marginal transactions under *written contracts*. There is no conflict of law upon the relation of broker and customer as to such deposits, or as to the rule of interpretation of written contracts.

The conflict between the New York and Massachusetts State Courts, the former "holding that where a broker *buys stock on a margin* the title is in the customer for whom he buys; the other that it is in the broker," involved in Richardson *v.* Shaw, 147 Fed., 659, 662, is not presented in this record. The Massachusetts rule has not been extended to

stock *deposited as collateral* for speculative account. All the Massachusetts cases, and *In re Swift,* 112 Fed., 315, speak of and involve only stock *purchased by the broker* on speculative account.

There is clear distinction between stock *bought on margin* and stock *deposited as collateral* on marginal account. In one case the question is whether title passes to customer in stock purchased by a broker, not intended for delivery to customer, and to be paid for and carried by broker almost entirely with his own funds; in the other, whether title passes from customer to broker in stock deposited for the sole purpose of protecting latter against loss because of customer's trading, and which can be transferred by broker only upon approximate exhaustion of margin. Illustrated by Willard *v.* White, 56 Hun, 581, and Sillcocks *v.* Gillaudet, 66 Hun, 522, holding that stock deposited as collateral for speculative dealings with broker, and by broker pledged to secure a general loan to himself, had equity superior to stock bought on margin, and pledged on same loan.

Other questions presented in Richardson *v.* Shaw are not involved here:

(1) Whether money paid by a broker the day before he makes a general assignment, broker and customer knowing broker's insolvency, to reduce customer's margin, is a preference within the bankruptcy act.

(2) Whether *lex loci* or *lex fori* shall control.

The present case was held by the Circuit Court of Appeals, and is conceded by petitioner's counsel (Petition, fol. 25) to depend not upon the adoption or ejection of the New York rule that the law, *in absence of express agreement,* implies a certain contract between broker and customer as to stock bought on margin, *but upon interpretation*

of express contracts under which the stocks involved were deposited.

The Referee, District Judge and three Judges of the Circuit Court of Appeals, decided unanimously for respondents.

II.—THE CONTRACTS BETWEEN BERRY AND COMPANY AND RESPONDENTS SHOW INTENT TO PLEDGE THE STOCK, NOT TO TRANSFER IT IN LIEU OF CASH NOR TO PASS TITLE TO BERRY AND COMPANY.

Establishing that the understanding of parties was that the stocks were delivered as collateral only, negativing intent to pass title as well as the claim they were delivered in lieu of cash, are the facts that across the face of Taggart receipt were written in ink "Collateral on Account" so as to partly obliterate and cancel the printed matter (fol. 389); Bower's receipt recites only that the certificate is "deposited as collateral and to be used in taking up any stock purchased" (fol. 410); Hall's receipt stated only "Held as collateral" (fol. 459); and in the case of Donaldson it is stipulated it was understood the certificate was "deposited as collateral security" (fol. 422). Conversations with some of respondents at time of delivering the stock show this was the understanding of parties (fols. 299-305, 421). In statements rendered by Berry & Co. to customers, the stock is set down as "long" and "coll"—collateral (fol. 378).

Filson deposited his stock, receiving a receipt substantially like the one set out in petition, for the special purpose of releasing certain Pennsylvania stock which the broker was supposed to be carrying for him. Instead of applying the stock to such purpose, the broker used it as collateral for a loan for his own use, and the next day failed. Filson never received his Pennsylvania stock and no

Pennsylvania stock was found among the assets of the bankrupts, or as collateral for any loan (fols. 127 and 128).

Pre-eminent in all the contracts is the fact that the stock was deposited as collateral security—as a pledge. Any doubtful words in the contracts should be construed to confer power consistent with this main representation of broker to customers, and not, as petitioners contend, to nullify it. If special powers were conferred it was done to enable broker more readily to indemnify himself against loss on customer's account, and not with intent to pass title. The conditions upon which such powers could be exercised never arose. These customers always had ample margin; it never became necessary for broker to pledge or sell these stocks to protect himself in dealings of these customers, but the pledge to the Hanover Bank was made to raise money for use of broker or customers other than respondents.

Analysing receipt set forth in the petition (original of which contained no italics):

1. Nowhere is it stated the stock is received in lieu of cash; but it is described as a "deposit * * * as security." When money is delivered as margin, it pays and extinguishes the indebtedness *pro tanto,* and correspondingly increases the margin; but money, in such a case, is very different from stock. Money pays a debt; stock simply secures it. If the stock was given broker in lieu of cash, it must have been accepted as the equivalent of a certain sum of money, and this sum of money should have been credited to the customer. How much money? And where is it shown broker credited respondents with any such payment? Stock cannot be both deposited as collateral and transferred as a payment: if the former, customers retain title, subject to fulfilment of conditions; if the latter, title vests in broker with absolute right of disposition. That

these stocks were deposited as *collateral security* cannot be questioned, and was admitted again and again by petitioners, in argument in the courts below; they now wish that fact to be lost sight of in order to create the erroneous impression that the stock was delivered as part payment of the stocks to be purchased on margin.

2. "General Deposit" does not show intent to pass title. "Deposit" indicates the contrary. The distinction made was between a general and a special deposit. In either case, however, the title remains in the depositor. If he can identify his own property, he is entitled to it. If it is so mingled with other similar property that he cannot identify it, then he becomes a tenant in common in the mass with the owners of the other property.

3. "May *hold* the same as *margin* and as *security*" conclusively show intent that customer retains title. "Margin" adds nothing to "Security." Margin is simply the excess of value of securities held by the broker over amount of customer's indebtedness.

4. Authority to "apply the deposit in part payment or on account of *losses* on any or all transactions," &c., for customer's account, shows the stock was pledged, not sold. There was no right to apply the deposit except in case of *loss* by customer. Such language cannot be reconciled with petitioner's contention that the stock was intended to be applied as payment at time of deposit.

5. Broker had no power to repledge the deposited certificates or to substitute similar certificates (Petition, fol. 27). "It will be observed that the contract contains two distinct provisions. One re-

lating to the deposited stock and the other relating to the stocks, securities, etc., which the brokers are to purchase or sell for the client. It is the latter alone that the broker 'may repledge, rehypothecate or loan' when held by them as margin or otherwise." (Opinion of Circuit Court of Appeals.)

6. As petitioners rely principally upon these rights alleged to have been conferred upon brokers as to deposited stock, we will assume, but for the sake of argument only, that they were given. Such rights would not weaken respondent's position.

(*a*) Permission to *re*pledge and *re*hypothecate the stock shows original transaction to be a pledge or hypothecation. Trustees claim this authorized Berry & Co. to pledge or hypothecate the stock in order to borrow money to be used for its own purposes, regardless of the condition of customer's account. Such construction is unwarranted. Power to pledge, if given, was only for the purpose of borrowing money necessarily advanced by broker as part of the purchase price of the stocks bought for the same customer, not for borrowing money for other customers or himself. But even such a power as is contended for by trustees is entirely consistent with a pledge. Lawrence *v.* Maxwell, 53 N. Y., 19.

(*b*) "May substitute similar stocks," &c., does not indicate ownership in Berry & Co. The New York courts hold such power is conferred by law as to stocks bought on margin in absence of agreement, and that it does not change the relations of parties as pledgor or pledgee. Caswell *v.* Putnam, 120 N. Y., 153. Stock of the same company, having the same value, although it may be represented by a different certificate, not a *promise* of any kind, must be *simultaneously* substituted.

8. Berry & Co. "may without notice, upon *approximate exhaustion of margins*" sell the stocks. This forbids sale except upon that one condition.

9. If these provisions, when taken together, gave to Berry & Co. *all* the powers which an owner of the stock would have, there might be some ground for the trustees' argument; but they do not. In each case where a special power is given its scope is limited. For instance, the power to apply the deposit is limited to losses on transactions for account of the depositing customer. If Berry & Co. was owner, it could apply the deposit for every purpose. Power to sell without notice is limited both in time and place—only upon approximate exhaustion of margin and at enumerated stock exchanges. If Berry & Co. was owner, it could sell at any time and at any place. The bare fact that these special and peculiar powers were specifically mentioned in the receipt shows parties did not intend Berry & Co. to become the owner. Ownership, of itself, would carry with it every one of these special powers, and many more besides.

III.—RESPONDENTS MUST PREVAIL UNDER THE LAW OF NEW YORK, WHICH IS LEX LOCI AND LEX FORI.

Markham *v.* Jaudon (1869) decides the relation of broker and customer as to stock purchased on margin when no express contract is made to be that of pledgor and pledgee. That ruling has been repeatedly followed.

Content *v.* Banner, 184 N. Y., 121, 124.

Gillette *v.* Whiting, 120 N. Y., 402, 204.

Gruman *v.* Smith, 81 N. Y., 25, 27.

Henton *v.* Jerome, 54 N. Y., 480, 483.
Rothchild *v.* Allen, 90 Ap. D., 233, 235. Aff'd. without opinion, 180 N. Y., 561.

In Content *v.* Banner, decided Feb., 1906, in an opinion concurred in by all the judges, the Court says, p. 124:

> "In this case, although the brokers advanced the whole of the amount necessary to purchase the securities instead of only a percentage thereof (which has come to be commonly known as margin) the relation between them and their customers was that of pledgees and pledgor, as in Markham *v.* Jaudon (41 N. Y., 235), Baker *v.* Drake (66 N. Y., 518), and many other cases in this state based upon speculation stock transactions."

Petitioners' claim that Markham *v.* Jaudon has been overruled or limited upon the only point material to this case, is without foundation.

Butler *v.* Drake overruled Markham *v.* Jaudon only in an *immaterial* part (Petition, fol. 21).

> "The rule for adjusting damages in such case was settled by this Court in Butler *v.* Drake, 53 N. Y., 211, overruling Markham *v.* Jaudon (*supra*) upon the relation of damages, but leaving it *undisturbed in other respects.*"
>
> Gruman *v.* Smith, *supra.*

Courts bound by such a rule in respect to stock bought on margin, obviously would hold the title in stocks deposited under the express contracts with respondents remained in customers.

Lawrence *v.* Maxwell, Willard *v.* White and Sillcocks *v.* Gillaudet, *supra.*

In Ogden *v.* Lathrop, 65 N. Y., 158 (Petition, fol. 30), stock was delivered as security for a note, written authority being given payee of the note to "use, transfer or hypothecate the same at payee's option, payee being required, on payment or tender, at the proper time, of the amount loaned and interest to, return an equal quantity of said security, and not the specific stock deposited." Defendant sold the stock deposited but later returned to plaintiff the same amount of like stock. The Court held the sale was not a conversion. Clearly the decision has no application to the case at bar.

The decision of the Circuit Court of Appeals agrees with the New York authorities and is sound in reason.

It is respectfully submitted that the prayer of the petition should be denied.

October Term, 1906.

THOMAS THACHER,
Of Counsel for Anna D. Taggart.
RICHARD L. SWEEZY,
Of Counsel for Harris Filson.

Supreme Court of the United States.

EDWARD S. THOMAS, LLOYD M. HOWELL and ASHBEL P. FITCH, Jr., Trustees in Bankruptcy of Jacob Berry and Harold L. Bennett, individually and as Jacob Berry & Company,
Plaintiffs-in-Error,

against

ANNA D. TAGGART *et als.*,
Respondents.

Brief of Plaintiffs in Error. No. 197. October Term, 1907. Ordered to be argued with No. 122.

Upon writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted and filed March 28th, 1907.

Statement of Facts.

Plaintiffs in error are the trustees in bankruptcy of Jacob Berry & Company (*fol. 4*).

Jacob Berry & Company were stock-brokers in New York City. They made a general assignment for the benefit of creditors on the 26th day of November, 1904, and were adjudicated bankrupts on their own petition, a receiver being appointed on November 30th, 1904 (*fol. 30*).

On November 25th, 1904, Berry & Company procured a loan of $45,000 from the Hanover National

Bank, of New York City, giving stock collateral, in which was included stock certificates delivered to Berry & Co. by the respondents to margin speculative accounts. This loan was not paid, and the Bank sold a portion of the collateral to reimburse itself on November 26th, 1904, and subsequently turned over to the trustees in bankruptcy a cash balance and certain certificates of stock (*fols. 31, 32*).

Respondents, customers of Jacob Berry & Company, claimed the returned certificates of stock and the proceeds of the certificates sold.

All claims were referred to a referee in bankruptcy to hear and determine the interests of the various claimants.

The referee found in favor of seven claimants (*fols. 42–61*).

The District Court confirmed the finding of the referee (*fols. 65–66*).

From the decision in favor of five claimants, the present respondents, the trustees in bankruptcy, appealed to the United States Circuit Court for the Second Circuit, and that Court affirmed the decision below (*fols. 167–171*).

In re Berry, 148 Fed. Rep., 176.

A petition for a writ of certiorari was granted by this Court on the 28th day of March, 1907.

Three of the respondents, Mrs. Taggart, Mr. Filson and Mr. Bowers, delivered certificates of stock to margin their accounts, taking from Berry & Company the following receipt:

> "Received from (stating the name of customer and kind of certificate). The same to be a general deposit, and this receipt is given and received with the mutual understanding that Jacob Berry & Co. may hold the same as margin and as security for or apply the deposit in part payment of or on account of losses on any or all transactions in the pur-

chase or sale of stocks, bonds, securities or commodities made by them for your account.

This receipt is given and received upon the further understanding and agreement in consideration of Jacob Berry & Co. executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally by telegraph or telephone; that the said Jacob Berry & Company may repledge, re-hypothecate or loan any or all of said stocks, bonds, securities or commodities held by them on account thereof as margins or otherwise; may substitute similar stocks, bonds, securities or commodities therefor, and that said Jacob Berry & Co. may without notice, upon the approximate exhaustion of margins, sell or buy, as the case may be, any stocks, bonds, securities or commodities bought or sold or held by them as collateral or margin, or otherwise, as the case may be, without notice, provided, however, that such purchases or sales be made either upon the Consolidated Stock & Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or in any other Exchange in the City of New York where such stocks, bonds, securities or commodities are dealt in.

(Sgd.) JACOB BERRY & Co."

Mrs. Taggart's receipt had written on its face the words " collateral on account " (*fol. 131*).

Mr. Bowers deposited $150 on the printed receipt and two shares of New York, New Haven & Hartford stock upon a written receipt which stated " deposited as collateral and to be used in taking up any stock purchased, the $150 cash deposit to be included " (*fols. 138–139*).

Mrs. Taggart's original deposit consisted of eighty-three shares of United States Steel Preferred. These certificates were deposited by Berry & Co. as collateral for the $45,000 loan but were not sold by the Hanover National Bank and were returned by the Bank to the trustees (*fol. 124*).

Mr. Filson deposited on the same day that the securities were delivered by the bankrupts to the Bank as a collateral for the loan, ten shares of Atchison Preferred and ten shares of Erie First Preferred (*fol. 82*). He testified that these certificates were delivered to pay in full for forty shares of Pennsylvania, which he desired to have delivered to him (*fols. 85–86*).

These certificates were among those sold by the Bank. It is stipulated that at the sale made by the Bank these certificates brought the sum of $2,070.50 (*fol. 78*).

Mr. Bowers' certificate for two shares of New York, New Haven & Hartford stock was among those sold by the Bank. At the sale it brought in the sum of $283.87 (*fol. 143*).

Mr. Donaldson deposited three shares of United States Steel Preferred, which were deposited with and sold by the Bank bringing the sum of $283.87 (*fols. 142–3*).

Mr. Donaldson was given no receipt, but received a "bought notice" which will be referred to later.

Mr. Hall deposited twenty shares of United States Steel Common and thirty shares of American Ice Company Common. He received a receipt which simply stated "Held as collateral" (*fol. 154*). One of Mr. Hall's certificates for ten shares of United States Steel stock was among the unsold certificates returned by the bank to the trustees (*fols. 50–51*)

The respective claims present important variations which will be discussed in the points.

At the time Jacob Berry & Company placed these securities with the Hanover National Bank as collateral for the loan of $45,000 all of these claimants were indebted to Jacob Berry & Com

pany on account of marginal purchases of stock which had not been paid for in full, yet in each case the account if closed out would show a cash balance or profit due the customer.

The question involved on this appeal is whether the respondents are merely general creditors or are entitled to receive back from the bankrupts' estate the certificates of stock which they deposited as margin or as the Circuit Court of Appeals states it,

> "whether the relation of pledgor and pledgee is created between client and stock broker by a deposit of this character or whether such a deposit is not in effect a release of the client's title to the security to the broker which creates the relation of creditor and debtor."

POINTS.

I.

The Circuit Court of Appeals erred in construing the contract governing Mrs. Taggart's claim.

Mrs. Taggart's account shows that she indulged quite largely in marginal dealings and at any time would have had to pay the brokers a substantial cash sum in order to get delivery of the certificates of stock held for her account (*Exhibits A and B inserted between pages 74 and 75*).

On November 25th, 1904, for instance, she would have been obliged to pay over $10,000 to get delivery of the stock in her account. This account Mrs. Taggart had started with 83 shares of U. S. Steel preferred stock under the printed form of receipt (*fol. 100*).

The Circuit Court of Appeals said:

> "It will be observed that the contract contains two distinct provisions: One relating to the deposited stock, and the other relating to the stocks, securities, etc., which the brokers are to purchase or sell for the client. It is the latter alone that the brokers 'may repledge, rehypothecate or loan, when held by them as margin or otherwise.' As to the deposited stock, they 'may hold the same as margin and as security' for losses on any transaction, or may apply it in part payment of or on account of such losses. If money had been deposited instead of the securities, it would ordinarily have been credited on account to the clients and stood as a margin against losses; and as to any balance in the brokers' hands at any time the clients would have been merely creditors. If the securities had been deposited under a stipulation in the contract that they should stand as a margin for a specific sum, perhaps the same legal consequences would have attended the transaction. But there is nothing in terms, nor as we think by implication, which suggests that the parties contemplated any sale of the deposited stock to the brokers, or any sale or disposition of it by the brokers except in the event of losses of the client, approximately exhausting the marginal requirement."

The first paragraph of the contract reads—

> "Received from Anna D. Taggart, 83 shares U. S. Steel Preferred, No. 2.3563, c. 15546. the same to be a general deposit and this receipt is given and received with mutual understanding that Jacob Berry & Co. may hold the same as margin and as security for or apply the deposit in part payment of or on account of losses on any or all transactions in the purchase or sale of stocks, bonds, securities or commodities made by them for your account."

The Circuit Court of Appeals says that this portion of the contract alone is to be considered as applying to the deposited stock.

On analysis this first paragraph of the agreement provides that the deposited stock shall

(*a*) Be a general deposit ;

(*b*) Be held as margin ;

(*c*) And as security for, or applied in part payment of or on account of losses on any or all transactions, etc.

(*a*) GENERAL DEPOSIT.

The words " general deposit " convey a meaning antagonistic to the idea advanced by the respondents and approved by the Circuit Court of Appeals that deposited securities could only be used by the broker in case of loss or approximate exhaustion of margin. They would rather seem to indicate an intention that the broker should credit the customer's account with the certificates deposited and deal with the certificates according to the customs of the Stock Exchange, which would include the right to pledge these and substitute similar certificates.

Tausig vs. *Hardt, 58 New York, 425 ;*
Lawrence vs. *Maxwell, 53 New York, 19 ;*
Caswell vs. *Putnam, 120 New York, 153.*

The words general deposit are not in accord with the idea of a deposit as collateral security, which is surely a special deposit nor with a special property right or title in the customer, to the certificates themselves.

(*b*) HOLD THE SAME AS MARGIN.

The rule of the Circuit Court of Appeals appears to be that if money had been deposited as margin, it would have been credited on account to the customer, stood as margin against losses and as to any balance in the broker's hands the customers would have been mere creditors. If the securities had been deposited under a stipulation that they should stand as margin for a specific sum, the relation of debtor and creditor would perhaps have existed ; but that in the case of securities simply deposited as margin, the relation of debtor and creditor would not exist.

We find no ground for these distinctions. Money, securities with a stipulated value, and securities with a value not stipulated, are all deposited for the same purpose. The same legal principles should apply in each case. The very idea of a margin is that the customer makes a part payment upon the stock he orders purchased, borrowing from the broker the remainder of the purchase price. This part payment is credited to the customer on account.

Now whether the credit be given on money or securities there is no difference. The intention and purpose is the same.

The distinction between securities stipulated to stand as margin for a specific sum and securities stipulated to stand as margin without a specific sum being mentioned, is particlarly unreal. We can find no substance in it. It can only be based upon the idea that such a credit or margin should be in a specified amount.

If this is the idea it has no support in reason.

If a broker agreed to accept securities as a margin for a stipulated amount he would bind himself to that stipulated amount regardless of the rise or fall in value of the particular security. Such an

agreement would be impracticable because the margin might wholly disappear through the depreciation of the securities and so fail entirely while the broker was by his agreement bound to consider it a part payment of a specific sum.

From the customer's standpoint the appreciation of the security would make the latter's deposit with the broker perhaps greater than the broker required or than the customer needed to carry his speculative account.

On the other hand where securities are deposited as a margin without the amount for which they are accepted being stipulated, the reasonable implication is that they are accepted as a margin up to their value, just as money is accepted. Value may rise or fall; it is determined daily by a large number of transactions and is ascertainable at any moment. The broker is not precluded from requiring additional margin nor is the customer precluded from withdrawing unnecessary margin. An agreement of this character is practical. The deposit is credited to the customer at its value, as in this case.

This is the custom of brokers and it is undoubtedly this exact relation which was intended by the receipt at bar, so that even on the first paragraph of the receipt there is good reason for holding that the broker had other rights in the deposited security than to realize on it in case of loss.

But we urge that the receipt is all one instrument and should be read as a whole without arbitrary severance of the sentences. Read in this way and giving the words of the agreement their natural meaning, the right to re-pledge, re-hypothecate, loan and substitute similar securities, obviously applies to the securities deposited as well as to securities purchased on the customer's order.

The object of giving the receipt was to state the terms upon which the securities deposited were held.

Hence, the provisions of the second paragraph of the receipt would, in the absence of a specific exclusion apply to the securities deposited.

The second paragraph commences

> "This receipt is given and received upon the further understanding and agreement in consideration of Jacob Berry & Company executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone; that the said Jacob Berry & Company may re-pledge, re-hypothecate or loan any or all of said stocks, bonds, securities or commodities held by them on account thereof as margin or otherwise; may substitute similar stocks, bonds, securities or commodities therefor, etc."

The words with which the second paragraph starts "This receipt is given and received upon the *further* understanding" are sufficient to show that the deposited securities are included in the second paragraph and there is nothing in the words "said stocks" to exclude the securities deposited. On the contrary, it would be the securities specifically described, rather than those generally referred to, which would appear to be meant by these words. It is only by narrowing the words "said stocks" to stocks purchased, that a contrary meaning can be gathered.

The right to re-pledge, re-hypothecate or loan any or all of said stocks, bonds, securities or commodities is further defined by the words "held by them on account thereof as margin or otherwise."

The securities deposited were held by the brokers on account of the securities purchased as margin. They are thus expressly included in this paragraph of the receipt.

No other securities referred to in the receipt, either specifically or generally, would be held on

account or as margin for the securities purchased, except the securities deposited for margin.

The words are as inclusive as may be—"*any or all of said stocks, bonds, securities or commodities held by them on account thereof as margin or otherwise.*"

The fair construction is that under this first portion of the second paragraph of the receipt all stocks bought upon the customer's order, as well as all stocks deposited on account thereof, as margin, are meant, and as to all of them the broker is given the right to re-pledge, re-hypothecate, loan or substitute similar stocks.

This is further borne out by the remainder of the second paragraph of the receipt which says :

> "and that said Jacob Berry & Company may, without notice, upon the approximate exhaustion of margin, sell or buy, as the case may be, any stocks, bonds, securities, or commodities bought and sold, or held by them as collateral or margin or otherwise, etc."

This clause specifically includes securities held as collateral or as margin as well as securities bought and sold.

Taken as a whole, remembering what it was given for and giving all of the words a fair and natural meaning, it is apparent that the right to re-pledge, re-hypothecate, loan and substitute other securities is conferred, with regard to securities deposited as well as stocks purchased.

This is particularly evident when it is considered that a margin is given to a broker on account of the purchase price. Where the margin consists of money, the broker can pledge the stocks purchased for the balance of the purchase price, but where securities are given as margin the broker has to borrow the entire sum necessary to pay for the pur-

chased stock and can only do it by pledging the securities given as margin as well as the stock purchased. The deposited securities were given to the broker to work with, to start an account, and this conceded purpose is largely determinative of the construction of the contract at bar.

We contend that the powers of disposition expressly given the brokers under the printed contract authorized them to dispose of Mrs. Taggart's stock certificate, either by loaning or pledging ; that they had the further right of substituting similar certificates therefor, and Mrs. Taggart's position was by reason of these facts merely that of a creditor.

The case presented by Mrs. Taggart is that of a sale and agreement to exchange rather than that of a bailment and pledge, and consequently her rights are those of a creditor, not of a pledgor.

> *Sturm* vs. *Boker*, *150 U. S.*, *312*.
> *Laflin* vs. *Burkhardt*, *97 U. S.*, *116*.
> *Norton* vs. *Woodruff*, *7 New York*, *153*.
> *Carpenter* vs. *Griffin*, *9 Paige* (*New York*), *310*.

In *Sturm* vs. *Boker*, *150 U. S.*, *312*, *at page 329*, Mr. Justice JACKSON said :

> " The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form the contract is one of bailment and the title to the property is not changed. When on the other hand there is no obligation to return the specific article and the receiver is at liberty to return another thing of value he becomes a debtor to make the return and the title to the property is changed ; the transaction is a sale."

In *Norton* vs. *Woodruff* (*2 N. Y., 153*), GARDNER, *J.*, said:

> "The distinction between the obligation to restore the specific thing received or of returning others of equal value, is the distinction between a bailment and a debt, as recognized by decisions in England and this State, with the exception of *Seymour* vs. *Brown* (*10 Johns., 44*) The decision of *Seymour* vs. *Brown* has been overruled in the same Court in which it was pronounced."

By reason of this express contractual right of wide disposition the case is stipulated out of the New York doctrine that the broker is the pledgee, the customer the pledgor, in stock transactions, as exemplified by *Markham* vs. *Jaudon* (*41 New York, 235*).

Furthermore, *Markham* vs. *Jaudon* (*41 New York, 235*) and the other cases which have followed it down to and including *Leo* vs. *McCormack* (*186 New York, 330*), have concerned themselves with the customer's and broker's relations as to stock purchased for the customer's order. There is every reason in principle why securities deposited as margin should stand on a different basis, being, as they are, a credit on account to the customer and intended to give the broker something to work with in opening an account. These considerations we have previously referred to.

The question as to whether the Massachusetts rule (*In re Swift, 105 Fed. Rep'r., 493; Chase* vs. *Boston, 180 Mass., 455*), or the New York rule (*Markham* vs. *Jaudon, 41 New York, 235*), should be adopted by this Court, has been argued at length in the case of *Richardson* vs. *Shaw*.

We shall not repeat the arguments there urged, except to call attention to the fact that the requirements of business and the customs of business call for a rule which places title in the broker. That

this is particularly true in the case of securities deposited as margin by reason of the nature and purpose of such a deposit is obvious. The rule of law which most closely accords with equal justice to all and with the business practice and understanding of the community is the most desirable.

The relation of debtor and creditor as to securities deposited as margin clearly defines the business practice. To make the relation that of pledgor and pledgee is to work an injustice in instances such as this case presents.

To make the customer a creditor where he margins his account with money, and a pledgor where he margins it with stock certificate is to work a great difference in result where there is no difference in principle. It enables the certificate depositing customer to recoup in a case of bankruptcy at the expense of the money depositing creditor. It is not equality, but the most aggravated inequality.

This single consideration seems of sufficient importance to require this Court to place the two classes of customers upon an equal basis and require them to share in the bankrupt estate as creditors rather than permit the one to take all and the other little or nothing.

The opposite result would occasion a marked injustice based upon no sound distinction in principle.

Mrs. Taggart's claim should therefore be dismissed.

II.

Mr. Bowers' claim should have been dismissed.

In Mr. Bowers' case the cash deposited by him, $150, alone was specified in the printed contract similar to that in Mrs. Taggart's case. An-

other receipt was given at the time, as follows: "Received of W. C. Bowers 2 shares No. 64640 N. Y. N. H. and Hartford Railroad stock deposited as collateral and to be used in taking up any stock purchased, the $150 cash deposit to be included. Signed, Jacob Berry & Co." (*fols. 138-139*).

The words of this second receipt, "to be used in taking up any stock purchased," can only mean that the brokers had the right to apply the deposited stock in part payment of stock purchased. The only stock the broker had to take up was that purchased on the customer's order. The only way in which the broker could use the deposited stock in taking up stock purchased was by applying it in part payment therefor, and it was for use by the broker that the stock was delivered.

The Bowers' case, therefore, shows a contractual right to apply the deposited securities in part payment of any stock purchased. The written receipt alone is decisive of the question whether the debtor and creditor relation existed between the customer and the brokers.

The 2 shares of New York, New Haven & Hartford stock and the $150 cash deposited served to margin the purchase of 50 shares of Ontario & Western stock (*fols. 134, 135*).

On November 25, 1904, the 50 shares of Ontario & Western stock were held by the brokers for Mr. Bowers' account, and no payment had been made thereon except the 2 shares of New York, New Haven & Hartford stock and the $150 (*fol 134*).

On November 25, 1904, the brokers pledged the 2 shares of New York, New Haven & Hartford stock deposited by Mr. Bowers with the Hanover National Bank to secure a loan to them for $45,000 (*fols. 20, 21, 150, 151, 162*). This certificate was returned to the Trustees (*fol. 134*).

This loan was made to the brokers for their own purposes—not for the account of their customers.

If they used Mr. Bowers' stock as their own in securing this loan, they showed by that act that they had exercised their right to apply it to the part payment of purchases made for Mr. Bowers' account.

The very act of pledging it for a loan to themselves was an application of the stock under the Bowers' receipt. From this time on Mr. Bowers was a creditor merely. Title had passed to Berry & Company. It follows that a reversal should be had as to the claim and Mr. Bowers should be relegated to his proper remedy *i. e.*, filing his claim as a creditor.

III.

Mr. Filson's claim should have been dismissed.

Mr. Filson's account shows a series of marginal dealings on both sides of the market in which he at no time had sufficient cash deposited with the brokers to pay for the stocks ordered by him (*fol. 96*). On the morning of November 25th, 1904, Berry & Company were carrying for him on the long side 10 shares of Steel Common, 10 shares of American Car & Foundry, 10 shares of Wabash Common, 40 shares of Pennsylvania; on the short side, 20 shares of Atchison preferred, 10 shares of Erie first preferred, 10 shares of U. S. Steel preferred, 10 shares of Amalgamated Copper, and the account showed a cash balance of $3,105.97.

On November 25th, 1904, he deposited 20 shares of Atchison preferred and 10 shares of Erie first preferred (*fols. 82-83*) in order to pay in full for 40 shares of Pennsylvania stock and have the same delivered and transferred, taking the printed re-receipt (*fols. 76-77*).

These certificates were used to obtain the loan

from the bank by the brokers and were sold by the bank (*fol. 78*).

This express agreement and understanding to which Mr. Filson testified that the steel stock was given to the brokers in payment for the 40 shares of Pennsylvania, is decisive of his case.

He testified :

> "Q. And you delivered those to Jacob Berry & Company to be used as security, as I understand it, for this margin account? A. No, sir. They were to be used for the transfer of these forty shares of Pennsylvania.
>
> Q. Let me again ask you—they were to be used in substitution in that account for those forty shares of Pennsylvania were they not? They were to take the place of the forty shares of Pennsylvania as collateral security for that margin account, isn't that correct? A. The Pennsylvania stock was not security.
>
> Q. Was the Pennsylvania stock purchased outright by you? A. The putting in of those certificates was for the purpose of purchasing those Pennsylvania shares outright.
>
> Q. Stock that you delivered then was to be used as the purchase price of the Pennsylvania stock?
>
> A. Yes, sir.
>
> Q. You had not, up to the 25th day of November, 1904, paid in full for forty shares of Pennsylvania stock, had you? A. No, sir" (*fols. 85, 86*).

When the Atchison and Erie certificates were delivered in payment for the unpaid Pennsylvania stock title to the former passed at once to the brokers. Mr. Filson's right thereafter was with regard to the 40 shares of Pennsylvania stock alone. He could not by any possibility be considered a pledgor of the Atchison and Erie stock. He was simply a creditor, and should file his claim in bankruptcy.

IV.

Mr. Hall's claim should have been dismissed.

Mr. Hall deposited on November 1st, 1904, thirty shares of American Ice Company Common and two certificates for ten shares each of United States Steel Common, with Jacob Berry & Company. It is for one of the certificates for ten shares of United States Steel Common that he now claims (*fol. 149*).

He received a receipt as follows :

> "JACOB BERRY & Co.,
>
> NEW YORK, Nov. 1, 1904.
>
> Received of George E. Hall, Certificate No. 7350 D. 20 Ice Common, 7215 D. 10 Ice Common, F. 38401 and A. 47114 10 each United States Steel Common. Held as collateral.
>
> JACOB BERRY & Co." (*fol. 154*).

Mr. Hall testified :

> "I had that margin account with them and was carrying the ordinary account and I placed the certificate of stock as collateral for any indebtedness I might owe them at any time instead of putting cash into their hands for margin" (*fol. 149*).

On the same day Mr. Hall ordered the purchase of fifty shares American Ice for which he delivered no margin other than the certificates.

He received a bought notice as follows, dates, names and prices of course being filled in in the original :

"JACOB BERRY & Co.

Members of N. Y. Consolidated Stock Exchange, N. Y. Produce Exchange, Philadelphia Stock Exchange.

Bankers and Brokers, 42 Broadway.

New York, , 190 .

Philadelphia, Boston, Hartford, Montreal, Springfield, New Haven, Albany, Brooklyn, Quebec, Sorel, Bridgeport.

M—

It is understood and agreed that all orders to buy or sell stocks, bonds, securities or commodities are to be executed in accordance with and subject to the rules and customs of the Consolidated Stock and Petroleum Exchange of New York, or the Exchange where such transactions are made, and all orders executed by Jacob Berry & Co. are accepted whether the order be given in writing, orally, or by telegraph or telephone. It is agreed that Jacob Berry & Co. is appointed as agent to receive and deliver stocks, bonds, securities or commodities bought or sold for my account, with power to hypothecate, re-hypothecate, pledge or repledge, or loan any of said stocks, bonds, securities or commodities therefor, and to substitute similar certificates, and the said Jacob Berry & Co. are authorized upon the approximate exhaustion of margin, without notice to me, to buy or sell, as the case may be, any stocks, bonds, securities or commodities held by them for my account as collateral for margin or otherwise providing such purchases or sales be made upon the Consolidated and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or upon any other Exchange in the City of New York, where such stocks, bonds, securities or commodities are dealt in.

We have this day bought for your account and risk, subject to above conditions.

Amount. Description. Price. Name.

JACOB BERRY & Co.

Per — —."

On the 25th day of November, 1904, Jacob Berry & Co., were carrying on margin for Mr. Hall fifty shares American Ice Co., 100 shares Texas Pacific Railway and 100 shares Chicago and Great Western Railway, for which Mr. Hall had not paid and had as collateral on margin the certificate for ten shares United States Steel stock sought to be reclaimed, together with other securities (*fol. 151*).

The ten shares of Steel stock were delivered to the Bank as collateral for the Berry loan and by the Bank returned to the trustees with the other unsold collateral (*fol. 151*). Apart from the stock deposited as collateral, Mr. Hall's account if closed would show a profit of $275 on November 26th, 1904 (*fol. 151*).

On December 19th, 1904, Mr. Hall filed a proof of claim in bankruptcy in the amount of $1,875, which specifically included the value of the certificate of stock he seeks to reclaim in this proceeding. Mr. Hall's proof of claim stated the facts upon which his claim was based and contained the following:

> "Said deponent hereby stipulates that by filing a notice of this claim he does not waive any right of action that he now has to recover possession of said certificates, or the value thereof, against either of the bankrupts, or any person in whose possession they may be found, or any right of action that he has against either or both of said bankrupts for the conversion of said certificates to their own use, when said bankrupts knew that said certificates were not their property and never had been; and that the said deponent does not waive any right whatsoever of any kind, nature or description against the said bankrupts, or either of them, for or on account of the failure of the bankrupts or either of them to return said certificates to said deponent, and for the unlawful hypothecation and conversion of the same by said bankrupts or either of them."

At the first meeting of creditors on the 19th day of December, 1904, Mr. Hall voted his claim for Ashbel P. Fitch for trustee in bankruptcy in a contest between Mr. Fitch and Mr. Thomas. This vote was cast on what the referee called an informal ballot for the purpose of obtaining an expression of opinion.

At the formal election of trustee, on the 21st day of December, 1904, Mr. Hall did not vote for either candidate (*fol. 152*). His claim has never been withdrawn or reduced by withdrawing from it the value of the ten shares of United States Steel stock which he seeks to recover, nor has he ever expressed a willingness or made an offer to so reduce his claim.

The referee found that Mr. Hall "participated actively at the meetings held for the election of a trustee," and said that this would bar the prosecution of the present claim except for the reservation contained in the proof of claim filed (*fols. 48, 49*).

We urge that this filing of proof of claim in bankruptcy effectually precluded Mr. Hall from recovering in this reclamation proceeding. When Berry & Co. became bankrupt, Mr. Hall had optional remedies to pursue. He could either file a claim as a creditor in bankruptcy and participate in the estate in bankruptcy and in the control of that estate to the extent which his vote as a creditor entitled him, or he could bring a proceeding in the nature of a replevin to recover the certificate of stock.

Either of these methods he could pursue, both he could not; yet that is exactly what he attempted to do.

He filed his claim in bankruptcy for the full amount, giving notice therein that he did not intend to deprive himself of his right to follow the other course. He sought by force of his own frank

statement of intention to enlarge his legal rights. The law says: "You may do this thing or that thing, but you cannot do both." Mr. Hall said: "I will do this thing and also that thing."

To file his claim as a creditor he was compelled to ratify the conversion of the stock and affirm that title had passed. To reclaim his certificate of stock he had to take the exactly contrary position that there had been no conversion and that title was still in him. His proof of claim was filed on the 19th day of December, 1904 (*fol. 48*).

His first effort to reclaim the certificate of stock was made subsequent to March 25th, 1905.

Having chosen to file his claim in bankruptcy Mr. Hall is bound by that election, irrespective of any intention to preserve his right to the other and inconsistent remedy.

Bowker Fertilizer Co. vs. *Cox, 106 New York, 555.*

Fowler vs. *Bowery Savings Bank, 113 New York, 450.*

Conrow vs. *Little, 115 New York, 387.*

Terry vs. *Munger, 121 New York, 161.*

Mills vs. *Parkhurst, 126 New York, 89.*

Droedge vs. *Ahrens, 163 New York, 466.*

In *Terry* vs. *Munger* (*121 New York, 161*), personal property belonging to the plaintiff was wrongfully taken, and while still in the possession of one defendant, the plaintiff sued another party to the transaction on contract *to recover the value* thereof; later the plaintiff sued the other party to recover damages for the alleged conversion of the same property; PECKHAM, *J.*, said:

"Any decisive act of the plaintiffs, with

knowledge of all of the facts, would determine their election in such a case as this. The proof that an action of that nature had been in fact commenced would have been just as conclusive upon the plaintiffs upon the question of election * * * as could the judgment have been. It is not necessary that a judgment should follow upon the action thus commenced. * * * It was also held that a discontinuance of that action was immaterial. It was the fact that the plaintiffs once elected their remedy and acted affirmatively upon such election that determined the issue. After that the option no longer existed, and it was of no consequence, therefore, whether the plaintiffs did or did not make their choice effective. When it became necessary to choose between inconsistent rights and remedies, the election will be final, and cannot be reconsidered even where *no injury has been done by the choice, or would result from setting it aside.*"

In *Conrow* vs. *Little* (*115 New York, 387*), the plaintiff contracted to sell certain paper; after delivering a portion of the contract, it was discovered that the note which was given as an inducement to the plaintiffs, entering into the contract, was a forgery. Plaintiff brought an action for the value of the paper alleging the fraud, and sued out an attachment against the property of the purchaser and levied. The attachment suit was discontinued and an action was brought to recover possession of the paper. DANFORTH, *J.*, said:

"The contract between Branscom and the plaintiffs was, upon the discovery of Branscom's fraud, voidable at their election. As to him, the plaintiffs could affirm or rescind it. *They could not do both*, and there must be a time when their election should be considered final. We think that time was when they commenced an action

for the sum due under the contract, and in the course of its prosecution applied for and obtained an attachment against the property of Branscom as their debtor. They then knew of the fraud practiced by them, and disclosed that knowledge in the affidavit on which the attachment was granted, and became entitled to that remedy because it was made to appear that a cause of action existed in their favor by reason of 'a breach of contract to pay for goods and money loaned, obtained by fraud.' The attachment was levied, and the action pending when the present action, which repudiates the contract and has no support except on the theory of its disaffirmance, was commenced. The two remedies are inconsistent. By one the whole estate of the debtor is pursued in a summary manner and payment of a debt sought to be enforced by execution; by the other, specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of contract, the other can be maintained only by showing that there was no contract. After choosing between these modes of proceeding, the plaintiff no longer had an option. By bringing the first action, after knowledge of the fraud practiced by Branscom, the plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election.

It is not at all material to the question that the plaintiff discontinued the first suit before bringing the present to trial, for it is a fact that the plaintiffs elected this remedy and acted affirmatively upon that election; that determines the present issue."

Mr. Hall made his election when he filed his proof of claim. While still adopting the position of creditor and ratifying the conversion by proving for the value, he brought the new action for the recovery of the certificate. It is his act which binds

him and he cannot escape the legal effect of that act by any declaration made while doing it.

The referee has found that the claimant actively participated at the meetings held for the election of a trustee and his finding of this fact is conclusive, although the claimant did not vote his claim at the formal election of trustees on the 21st day of December (*fol.* 48). The filing of the proof of claim and the voting thereon for trustee, even at an informal election, is inconsistent with the claim of ownership to the stock, and bars any later reclamation proceedings for the property.

Le Marchmont vs. *Moore*, *150 New York, 209* (*p. 218*).
In re Bloss, *No. 1562*, *Fed. Cas.*
New Bedford Ins. vs. *Fairhaven Bank*, *9 Allen, 175, 180.*
Ex parte Solomon, *1 Glyn & J., 25.*
Haxton vs. *Corse*, *2 Barb. Ch., 531.*
Loveland on Bankruptcy, *2nd Ed., p. 339.*

Le Marchmont vs. *Moore* (*150 N. Y., 209*), was a case in which plaintiffs had ordered stock purchased for them by brokers who subsequently made a general assignment for the benefit of creditors; the stock in question was held by the defendants for the broker's own account. Defendant sold the stock and turned the balance over to the assignee partly in stock certificates and partly in cash. Thereafter plaintiff filed proof of claim against the insolvent brokers. The Court said, on *page 218*:

"Ordinarily the plaintiffs would be entitled to recover the value of the Boston Air Line stock, or to have had that stock sold and the proceeds applied upon the indebtedness of Evans & Company (the insolvents) before the sale of the plaintiffs' stock. But, as we have seen, the plaintiffs, with full knowledge of all the facts, have proved and

filed their claim against the assigned estate for the full amount, less only the surplus derived upon the sale of the plaintiffs' stock.

It is stated in the submission of the controversy that this was done after the commencement of this action. The submission is dated the 14th of March, 1894. The proof of the claim is dated June 1st, 1892.

We are unable to understand how a claim could be proved after the submission of a controversy, and still the facts of such proof be incorporated in the submission. It is possible that an action had been previously brought, but we find no mention of it in the facts agreed upon. We cannot assume the existence of facts not incorporated in the submission for the purpose of reversing or adding to a judgment, neither can we determine whether or not the plaintiffs have received a dividend through the assignee upon their claim.

We are, therefore, of the opinion that the plaintiffs have waived their right to recover the value of the Boston Air Line stock."

In the *New Bedford Institution* vs. *Fairhaven Bank* (*9 Allen, 175, p. 180*), CHAPMAN, *J.*, said:

"But it is objected on the part of the plaintiffs that the defendants have forfeited their right to have this application made for their especial benefit, because they first proved their debts and then made use of their position as creditors to vote for the discharge of the debtor, and that they have thereby affected the rights of the plaintiff injuriously. * * *

But the fact that the defendants thus acquired the power to control the vote of creditors on the question of the debtor's discharge and actually exercised that power, and procured the discharge, must be considered as a material interference with the rights of other creditors. * * * After they have done this on the ground that they have no lien on

the mortgage, it is not equitable to permit them to insist upon the lien, and thus obtain a preference over other creditors. The equitable considerations which favor the equal distribution of assets among the creditors ought not to be set aside in such a case. On the contrary, we think the defendants should be bound by the position which they have taken.

But the defendants contend that the acts referred to were done by them in ignorance of the fact that they had a lien. * * * Whatever their ignorance may have been, if they have ignorantly proceeded in such a manner as to affect the rights of other parties, the injurious consequences of their acts ought to be thrown upon themselves, and not thrown upon others."

In *Ex parte Solomon* (*1 Glyn & J., 25*), the Vice-Chancellor said:

"The only question was whether Heath, having proved, and voted in the choice of assignee, and signed the bankrupt's certificate, was bound to abide by his proof and deliver up the patent, or was still at liberty to retract his proof, and resort to the patent in satisfaction of his debt *pro tanto*. * * * The signing of the certificate is an act affecting the interests of the rest of the creditors, and the party must abide by his proof and deliver up the patent."

Loveland on Bankruptcy (*2nd Ed., p. 339*), says:

"Where a creditor by proof of his debt has taken part in the meetings of creditors and controlled the action of others in the choice of a trustee, or influenced the question of the bankrupt's discharge, he has been held precluded from any subsequent change in his proof."

The claim of Mr. Hall should, therefore, be dismissed.

V.

Mr. Donaldson's claim.

Mr. Donaldson, on or about the 31st day of October, 1904, delivered a certificate of three shares of U. S. Steel Corporation to Jacob Berry & Co. in order that he might deal in stock on margin. It was verbally agreed that the stock was deposited as collateral security for the account (*fol. 141*). No receipt was given. Various purchases were made by Donaldson and a bought notice was sent on the same form as that sent Mr. Hall, which is printed in full in the preceding point of this brief (*fols. 141–142–146*).

Berry & Co. pledged the certitificate in question to the Hanover National Bank to secure their personal loan, and the certificate was sold by the Bank realizing $283.87. Mr. Donaldson's claim was for a lien upon the funds returned from the Bank (*fols. 142–3*).

This case emphasizes the different conditions which existed in the other cases.

In the Taggart case there was an express and specific contractual right given to the brokers to loan or pledge the deposited certificates and to substitute others therefor, totally destroying the relation of pledgor and pledgee.

In the Bowers case there was an express contractual right to apply the certificates deposited in part payment of stock purchased, which was exercised.

In the Filson case the certificates deposited were paid to the brokers for other stock.

In the Hall case there was a renunciation of the right to recover the certificates deposited by reason of the election to treat the brokers' acts as a concession.

VI.

Conclusion.

The order below should be be reversed as to the Filson, Taggart, Bowers and Hall claims.

Respectfully submitted,

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Supreme Court of the United States.

EDWARD S. THOMAS, LLOYD M. POWELL and ASHBEL P. FITCH, Trustees in Bankruptcy of Jacob Berry and Harold L. Bennett, individually and as Jacob Berry & Company, Petitioners,

vs.

ANNA D. TAGGART *et al.*

Brief on behalf of Harris Filson, claimant to proceeds of twenty shares preferred stock of the Atchison, Topeka and Santa Fe Railroad Company, appellee.

Statement.

Appeal by Trustees in Bankruptcy on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, from a decree affirming an order of the District Court, Southern District of New York, confirming order of Stanley W. Dexter, Esq., Special Commissioner in reclamation proceedings.

This case has been advanced, by an order of this Court, so as to be heard at the same time as the case of Richardson, trustee, *v.* Shaw *et al.*

The facts upon which this controversy turns are entirely undisputed.

Jacob Berry & Company, bankrupts, who were brokers, doing business on the Consolidated Stock

Exchange in the City of New York, finally closed their doors at the close of business on the afternoon of the 25th day of November, 1904, making a general assignment on the morning of the 26th of November, 1904, and going into bankruptcy within two or three days thereafter.

The appellee, Harris Filson, had for some time been a customer of Berry & Company, trading through them on both sides of the market.

On the morning of the 25th day of November, 1904, being the last day on which Berry & Company transacted business, as above stated, the state of Mr. Filson's account with the firm was as follows:

He was long ten shares U. S. Steel common, ten shares American Car and Foundry common, ten shares Wabash, and forty half-shares of Pennsylvania; he was short twenty shares of Atchinson preferred, ten shares Erie first preferred, ten shares U. S. Steel preferred, and ten shares Amalgamated Copper, and he had a cash balance to his credit of three thousand one hundred and five 97/100 dollars; that is, the above was the nominal situation of Mr. Filson's account. At previous dates he had given orders for the purchase and sale of the securities above mentioned; had furnished margin, as required by Berry & Company, for the purchase and sale of such securities, and they had reported to him that the securities had actually been purchased or sold, as shown by the above statement. There is sufficient evidence, however, to justify a finding, if such finding were necessary to appellee's case, that the whole thing was a fraud on the part of Berry & Company, and that they had not actually purchased and sold said securities as directed, and as they reported that they had done, but had simply taken the claimant's money and had made bookkeeping entries to his debit or credit as the case might be; or, in the vernacular of the

street, had taken Mr. Filson's money and bucketed his orders.

On the morning of the 25th of November, 1904, Mr. Filson called at the office of the bankrupts. He testifies that the object of his call was to arrange for the taking out of the account and the actual transfer to his wife of the forty half shares of Pennsylvania stock which Berry & Company were supposed to be carrying long for him. His account was amply margined, and no call had been made upon him by Berry & Company for further margin. He took with him a certificate for ten shares of Atchison first preferred. He enquired of the bankrupts' bookkeeper as to the state of his account and as to how much additional security it would be necessary for him to put up in order to procure the release of his forty half shares of Pennsylvania (page 43, Transcript of Record).

The bookkeeper, after looking up the account, said that the ten shares of Atchison preferred which Mr. Filson had with him would leave too small a margin to release the Pennsylvania stock and carry the other stocks. Thereupon Mr. Filson returned to his safe deposit box, took out a certificate of ten shares of Erie first preferred and another certificate for ten shares of Atchison preferred, took them back to the bankrupts, and the bookkeeper reporting that the deposit of these additional shares would furnish ample security, Mr. Filson left the shares with the cashier, with instructions forthwith to transfer to his wife's name the forty half shares of Pennsylvania stock, and the bankrupts accepted said stocks, including the twenty shares of Atchison preferred in question for the purpose of having transferred, and upon the sole condition that they would immediately procure the transfer to Mrs. Filson of the forty half shares of Pennsylvania stock in question, and which they were supposed to be carrying long for the plaintiff (pages 43, 50 of Transcript).

Mr. Filson received receipts from Berry & Company for the stock so deposited with them, setting forth the numbers of the respective certificates, and which also recited that the said stocks were to be held by Berry & Company "as margin and as security" for the transactions of Mr. Filson with said brokers (page 47 of Transcript).

Instead of having the Pennsylvania stock transferred, as claimant ordered, and as they undertook to do, the bankrupts, the same day, pledged the twenty shares of Atchison preferred with the Hanover Bank for a loan for their individual benefit, and transferred no Pennsylvania stock to claimant (page 44 of Transcript), and the next morning, when they suspended business, no Pennsylvania stock whatever was found in the possession of the bankrupts, or as collateral for any loans that they had outstanding (page 45 of Transcript).

The Hanover Bank, with whom claimant's stock was pledged by the bankrupts, together with other stocks, as collateral security for a loan made by said bank to the bankrupts, sold said stock for the sum of $2,072.50 (page 44 of Transcript).

After applying a balance which the bankrupts had with the bank and the proceeds of the stocks sold by it, there remained a cash balance in the hands of the bank of $6,310.41, and certain unsold stocks, which cash balance and unsold stocks the bank, by order of the District Court, turned over to the trustees in bankruptcy, without prejudice to the claims of the respective claimants thereto.

POINTS.

First.—The conceded facts of this case show a clear conversion by the bankrupts of the twenty shares of Atchison preferred deposited with them by the claimant Filson.

This was so, notwithstanding the unquestioned fact that the stock was delivered to the bankrupts with the right, upon certain conditions, to use the same as collateral, in accordance with the customs of stock brokers.

This stock was delivered to the bankrupts for the sole purpose of procuring the release of the Pennsylvania stock, and upon the condition that the Pennsylvania stock should be so released (pages 43, 44, 48, 49, 51, 53 of Transcript).

The release of Mr. Filson's Pennsylvania stock was a condition precedent to the right of Berry & Company to use the Atchison stock for any purpose whatsoever.

If the bankrupts had satisfied the condition upon which the stock was delivered to them; that is, if they had released the Pennsylvania stock, they would then have had a right to use this Atchison stock in the same way they had the right to use the Pennsylvania stock; that is, as collateral for any loan necessary to raise the amount to pay any unpaid amount due upon the stocks that they were carrying for Mr. Filson; but when the bankrupts accepted the stock upon the condition that they should release and transfer the Pennsylvania stock, and did not transfer the Pennsylvania stock, but used the Atchison stock for their own purposes, they then diverted the Atchison stock from the sole purpose for which it was deposited with them, and were guilty of a conversion of it.

The situation is precisely the same as where a person issues a promissory note, and entrusts it to

a third person to be used for some particular purpose, and the person to whom the note is entrusted diverts it from the purpose for which it was entrusted to him, and uses it for some other and different purpose, and thereby becomes guilty of a conversion of the note, although, if he had used the note for the purpose for which it was entrusted to him, he could have transferred a good title even to a person who took with knowledge of all the facts.

It is familiar law that in the case of receipts and other instruments incomplete upon their face, parol evidence can be given of the remainder of the agreement, and also that parol evidence is admissible to show an agreement annexed to the delivery of an instrument affecting the consideration thereof, and constituting a condition precedent to the taking effect of the instrument.

Chapin *v.* Dobson, 78 N. Y., 74.
Thomas *v.* Scutt, 127 *Id.*, at page 138.
Reynolds *v.* Robinson, 110 *Id.*, 654.

There can be no doubt upon the evidence as to the conditions upon which the twenty shares of Atchison stock in question were deposited by Mr. Filson with the bankrupts.

The bankrupts were supposed to be carrying for Mr. Filson forty half shares of Pennsylvania stock previously purchased by them for him. This Pennsylvania stock they held, of course, as collateral to Mr. Filson's account.

The purpose and intent of the transaction on the morning of the 25th of November, 1904, was to substitute the Atchison stock for the Pennsylvania stock, and thereby release to Mr. Filson the Pennsylvania stock. This fully appears, not only from Mr. Filson's uncontradicted testimony, but also from the terms of the receipt given by the bankrupts, and from the memorandum entered on the same day by

the bankrupts in Mr. Filson's account upon their books (page 56 of Transcript).

Counsel for appellants detaches from the body of Mr. Filson's testimony an answer to a single leading question, to wit: "Q. Stock that you delivered then was to be used as the purchase price of the Pennsylvania stock? A. Yes, sir" (page 49 of Transcript), and endeavors to argue from that answer an intention on the part of Mr. Filson to transfer the title to his Atchison stock to the bankrupts upon an executory agreement by the latter to purchase for him forty half shares of Pennsylvania stock.

The transaction will bear no such construction; it evinces no intention on the part of Mr. Filson to part with the title to his Atchison stock. He deposited it with the bankrupts, with power on their part to use it as margin to protect Mr. Filson's transactions with them, provided they first released to him the Pennsylvania stock, in substitution for which the Atchison stock was delivered to them.

There is no inconsistency between the position we now take and the receipt which Berry & Co. gave to Mr. Filson.

The receipt states that the stocks are deposited with, not sold to, Berry & Co., and are to be held as margin or security for the depositor's transactions in purchase and sale of stocks. Berry & Co. are given no authority to use the stocks for any purpose unless it should become necessary for their protection in transactions entered into by them in obedience to the orders of their customer.

Not having executed Mr. Filson's order to transfer to him 40 half shares of Pennsylvania stock, Berry & Co. had no right to use the Atchison stock for any purpose.

Second.—If there had been no special agreement at the time of the deposit of the Atchison stock limiting the right of Berry & Co. to use it for the special purpose mentioned, claimant would still be entitled to recover his stock or the proceeds thereof.

There was nothing in the terms of the receipt or in the customs of stockbrokers applicable to the case to imply an intent on the part of his customer to part with the title to his stock by the mere fact of delivery of same to the broker.

The clear intent of the transaction was to deposit the stock as margin for the protection of the broker If the broker failed to execute his customer's orders and never used it as margin, and had no occasion to use it for his protection, it is absurd to claim that by the mere fact of the deposit the customer as against the broker, and those claiming under him, has lost title to his stocks.

Under the circumstances it seems to us entirely unnecessary for counsel for the claimant Filson to enter into any discussion of the elaborate argument presented by counsel for the trustees in reference to the legal relations existing between stockbrokers and their customers.

Berry & Co. executed no order of Mr. Filson's after the deposit of the stock in question. What might have happened if Berry & Co. had assumed any obligations on the faith of the deposit with them by Mr. Filson of the stock in question is quite immaterial therefore in Mr. Filson's case.

We understand, however, that it is conceded by counsel for the appellant that under the rule as established by the New York courts the relation between a customer and broker is that of pledger and

pledgee, and he claims that this Court should adopt a different rule.

Although this Court may not be bound to follow the decisions of the New York State Courts on this question, yet it is respectfully submitted it should not refuse to do so except for the weightiest of reasons.

It is easy to be seen that it would give rise to endless confusion if, in the City of New York, the greatest financial centre of the world, two rules should exist for regulating the stupendous financial transactions there carried on; one of such rules being administered by the State courts and the other by the United States courts.

The relations in the City of New York between stockbrokers and their customers are regulated by customs long established and having the effect of local usage or local law. The decisions of the State courts upon that subject are simply declaratory of this usage.

In the case of Swift (112 Fed. Rep), relied upon by counsel for the trustees, the United States Court sitting in Massachusetts, professedly administered the local law of Massachusetts as determined by local customs of brokers in that State and the decisions of Massachusetts courts declaratory of the same.

As pointed out by the learned Referee, this printed form of receipt of Berry & Company gave them no greater powers of disposal in respect to the collateral than they already possessed by law and custom, except in one particular only, to wit: they were permitted to sell the pledged securities without notice, but only "after the approximate exhaustion of margins." And, as stated in the opinion of the Court below, "the relation of pledgor and pledgee certainly continues until losses arise which justify a sale of the stock" (page 98 of Transcript).

The right of substitution of like securities, upon which such stress is laid by counsel in his argu-

ment, is one which custom gives to stockbrokers, to be exercised when necessary for their protection. The reason why such substitution does not make the broker liable to an action for conversion, provided the broker keeps on hand a sufficient amount of like securities to answer the demand of his customer, is pointed out by the Court of Appeals in Caswell *v.* Putnam (120 N. Y., 153). See also Douglas *v.* Carpenter (45 N. Y. Supp., 219).

Clearly, as long as the identity of the stock is not lost, the title thereto remains in the customer, except as against a *bona fide* purchaser or pledgee.

A fair construction of the receipt is that no right of substitution, or any other use of the stock, on the part of the broker exists, unless some exigency should arise in the course of his dealings with his customer making it necessary for the broker to use the stock for the purpose of his customer's business.

In consideration of his executing such orders as his customer should give him, the broker was authorized to use the stock in the manner specified in the receipt as collateral to the obligations of his customer to him.

If he did not execute his customer's orders, or if no occasion should arise in the course of his dealings with his customer to use the stock, he certainly could not, under any fair construction of the receipt, have any right to use the pledged stock for his own purposes, or to hold title thereto as against his customer.

It is entirely clear, therefore, in the case at bar, no matter what views the Court might hold upon the general subject of the relations between brokers and their customers, that Berry & Company, not having executed the order given to them by Filson when he deposited the stock, and confessedly having had no occasion to use it for the protection of the other deals which Filson had with them, had no right to pledge the stock to the Han-

over Bank, and if it had not been pledged, but had remained in their possession, the trustee in bankruptcy, who has no greater rights than the bankrupts themselves would have possessed, could not have withheld the same from the claimant.

Suppose a man goes to his broker; directs him to purchase, say one hundred shares of N. Y. Central, and delivers to the broker, say twenty shares of Atchison stock to be held by the latter as collateral to the obligations to be assumed by the broker in making purchase of the Central stock, can it soberly be claimed that the customer has thereby, *eo instanter*, lost the title to his stock, and that the broker, without executing his customer's order, can hold the stock deposited as his own property, leaving his customer no remedy but an action upon implied contract for the value of the stock, so that if the broker should fail, the remedy of the customer would be limited to proving his claim and taking his dividend?

The foregoing situation precisely fits the Filson case, with the added fact that the brokers, in addition to neglecting to execute their customer's order, wrongfully pledged the stock for their own use—to obtain a loan for themselves.

Third.—Claimant clearly identified the proceeds of his stock, and the decree appealed from affirming the order, so far as respects the claim of Harris Filson, should be affirmed, with costs.

All of which is respectfully submitted.

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Supreme Court of the United States.

EDWARD S. THOMAS and others,
Petitioners,

AGAINST

ANNA D. TAGGART and others,
Respondents.

No. 197.

October Term, 1907.

SUPPLEMENTAL BRIEF FOR RESPONDENT ANNA D. TAGGART.

When we prepared our brief in behalf of the respondent Anna D. Taggart we had not seen the brief which has been filed by the petitioners. We prepared our brief upon the assumption that the petitioners would rely in this Court upon the arguments which they advanced before the Circuit Court of Appeals and in their petition to this Court for a writ of *certiorari*. We now see that the petitioners have abandoned a number of the arguments heretofore advanced, and, among others, the argument that the relation between Mrs. Taggart and Berry & Company with reference to securities purchased and carried for her or with reference to the Steel stock delivered by her to Berry & Co. is not governed by local law, but should be governed by general law, and that the true relation is

debtor and creditor rather than pledgor and pledgee. We now understand the petitioners to admit that the relation with respect to the securities purchased and carried by Berry & Company for Mrs. Taggart's account is governed by the New York law and was pledgor and pledgee, and to argue that the relation with respect to the Steel stock delivered by Mrs. Taggart to Berry & Company was by Exhibit C stipulated out of the New York doctrine. (Petitioners' Brief, p. 13). It thus appears that the question of the conflict of law between Massachusetts and New York and between the Circuit Courts of Appeal of the First and Second Circuits, which are made the basis of the petition for the writ of *certiorari*, is no longer involved in the case. Much that is said under our fourth and fifth points is accordingly inapplicable.

It being admitted that the relation between Mrs. Taggart and Berry & Company with reference to securities purchased and carried for her is governed by New York law, it must necessarily follow that the relation created by a delivery of securities by Mrs. Taggart to Berry & Co. "as margin" would also be governed by New York law. The New York courts have held uniformly that the relation created by the delivery of securities by a customer to a broker "as margin" is pledgor and pledgee, the transaction being nothing more or less than a pledge of the securities to protect the broker against loss on the customer's transaction, and that the customer has the right, upon paying his indebtedness to the broker or otherwise discharging the broker's lien, to redeem the securities from the broker or his assignee.

DeCordova v. *Barnum*, 130 N. Y., 651.
LeM[illegible]ant v. *Moore*, 150 N. Y., 209.
Willard v. *White*, 59 Hun, 581.
Sillcocks v. *Galladet*, 66 Hun, 522.

Hence, the arguments on pages 8 and 9 of Petitioners' brief as to the meaning of the provisions of

Exhibit C that Berry & Co. might hold the Steel Stock "as margin" are of no avail. These words must here be given the meaning attributed to them by the New York law.

Petitioners further argue (p. 7) that the words "the same to be a general deposit" are not in accord with the idea of a deposit as collateral security. Petitioners do not, however, go so far as to argue that these words affirmatively indicate a sale, and for such an argument there could be no foundation. The word "deposit," when applied to securities, is certainly contrary to the idea of a sale. A seller of securities does not "deposit" them with the purchaser. The word indicates that the depositor is to receive the securities back at some time and in some form. This provision of Exhibit C obviously means that the securities deposited are to be held generally as security for all claims against the person depositing, and not specially as security for some particular claim.

Respectfully submitted,

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EDWIN W. LAWRENCE,
Of Counsel for Respondent
Anna D. Taggart.

Supreme Court of the United States.

EDWARD S. THOMAS LLOYD M. HOWELL, AND ASHBEL P. FITCH, Trustees in Bankruptcy of Jacob Berry and Harold L. Bennett, individually and as Jacob Berry & Company, Petitioners,

vs.

ANNA D. TAGGART, *et al.*

No. 197

Brief on Behalf of George E. Hall, Respondent.

FACTS

For about one month prior to the failure of Berry & Co., on November 26, 1904, George E. Hall had an account with the bankrupt firm who had purchased for him certain shares of stock. As collateral security for his account he had turned over certain certificates of stock owned by him as follows: October 17, 50 shares of A. I. Common; and November 1, 30 shares of A. I. Common (2 certificates); and 20 shares of U. S. Steel Common (2 certificates), (R. Pgs 86-87). One of the latter certificates for 10 shares of U. S. Steel Common, No. A-47114, is the certificate now sought to be reclaimed.

On the day of the failure Berry & Co. sold the stock bought for Hall on margin, and, after such sale, owed

him $275.00 in addition to his collateral (R. Pg. 87) and held in their possession the said 80 shares of A. I. Common and 10 shares of the U. S. Steel Common stock. The day previous to the failure Berry & Co. had, without Hall's knowledge or consent, delivered said certificate No. A-47114 to the Hanover National Bank as part security for a loan to Berry & Co. of $45,000.00. Berry & Co. did not assign the certificate to the Hanover National Bank but simply delivered it with the power of attorney (Ex. D. R. Pg. 90) attached thereto.

The Hanover National Bank afterward returned to the petitioners as trustees of Berry & Co. certain certificates of stock, among which was Hall's certificate No. A-47-114 (R. Pg. 87). Hall immediately brought reclamation proceedings to obtain possession of his collateral, and has obtained, through an order of this Court, the return of all (R. Pg. 27) except said certificate No. A-47114, now in the possession of the trustees, free from any claim or lien on the part of the Hanover National Bank, or the trustees.

POINT I.

THE LEGAL AND EQUITABLE TITLE TO THIS CERTIFICATE IS IN GEORGE E. HALL.

Hall did not endorse the certificate nor execute an assignment of it to Berry & Co. but simply annexed a power of attorney thereto (Ex. D. R. Pg. 90), which was received by Berry & Co. to be "Held as collateral" (Ex. B. Pg. 89). This power of attorney merely gave Berry & Co. power "for *me* (Hall) and in *my name* and *behalf to sell, assign and transfer*" the certificate. Berry & Co. had no title to this certificate and the words "sell, assign and transfer" are all words of sale and cannot be construed to mean pledge. A power to sell is not a power to pledge, and an agent to sell has no authority to pledge.

Merchants' Bank *v.* Livingston, 74 N. Y., 223.
Henry *v.* Marvin, 3 E. D. Smith, 71.
Halliwell, Stocks and Stock Brokers, p. 681.
Story on Agency, Sec. 78.

The Hanover National Bank had actual notice from the certificate and the power of attorney that Hall and not Berry & Co. had title thereto and that Berry & Co. had no authority to pledge it for a loan.

Merchants' Bank *v.* Livingston, *supra.*

Title could not be had through Berry & Co. except by exercise of the authority conferred in said power of attorney, mere transfer of possession not being sufficient. Consequently the Hanover National Bank was not a bona fide holder of the said certificate and had no valid lien thereon and the same was not sold or transferred by them for the very obvious reason that they had no power to do so.

The receipt (Ex. B. R. Pg. 89) sets forth the contract Hall had with Berry & Co. and must not be confused with those received by Filson, Taggart & Bowers, the other claimants, as illustrated by the receipt to Taggart (Ex. C. R. Pg. 76), which contained language not found in the Hall receipt. "Held as collateral" tells the whole story and Berry & Co. had no more rights over this certificate than the law implies to any pledgee of stock. This conclusion is supported by an examination of the said power of attorney which is silent as to any authority to pledge, or to use for the benefit of Berry & Co., it providing that the powers conferred are to be exercised for "*me* (Hall) and in my behalf". The language of said receipt is unequivocal and clear, the word "held" signifying to hold, retain possession of, and it is ridiculous to contend that authority is given to dispose of the certificate. In addition to the receipt is the express agreement of the agent of Berry & Co. to "keep it (certificate) in the New York office". (R. Pg. 87). It is a reasonable inference to draw from the fact that Hall did not accept the usual receipt of Berry & Co., in the form of Exhibit C (R. Pg. 76), that he did not desire Berry & Co. to have the powers therein conferred, but that they should hold the certificate and not dispose of it except to protect themselves upon the account. The question here is largely one of contract and not the construction of laws of various states, and it is claimed, that

as the contract provided that the stock was to be "held as collateral", "In the New York office", and there being no reason why it should be further held for such purpose, it should be returned forthwith, its mission as security being fulfilled.

Hennequin *v.* Clews, 111 U. S., 676-682.

If the Hanover National Bank had any claim on the certificate by reason of the wrongful attempt of Berry & Co. to pledge it, the same is now satisfied in full, and the certificate is held by the trustees free from any lien. Under such circumstances the law is well settled that the owner is entitled to his certificate.

Union Pacific Ry. Co. *v.* Schiff, 78 Fed. Rep., 216,
LeMarchant *v.* Moore, 150 N. Y., 209.
Smith *v.* Savin, 141 N. Y., 315 at 326.
Farwell *v.* Bank, 90 N. Y., 483.
Rhinelander *v.* National City Bank, 36 App. Div. 11, (N. Y.)
Thompkins *v.* Morton Trust Co., 91 App. Div., 274, (N. Y.)

The trustees claim that Hall has lost title to the certificates. If so, when and how? Was it when Berry & Co. acquired possession of the certificate? No, because the same was "held as collateral", to be "kept in their New York office," and the power of attorney accompanying the certificate did not transfer the title. Was it between November 1st, when Berry & Co. received the certificate, and the 25th, when it passed into the possession of the Hanover National Bank? No, because nothing had transpired to change the contractual relation of pledgor and pledgee. That Berry & Co. held the certificate during this time is strong presumptive evidence that they considered themselves pledgees only and not until the day before the failure did Hall's certificate leave their possession, when they were in dire financial difficulties, and in a last hopeless effort to raise money, they threw all their moral and legal obligations to the four winds and converted the stock of all of their customers to their own use, as is evidenced by the cases of

the several respondents herein. Was it when Berry & Co. gave the certificate to the Hanover National Bank? No, because title thereto did not pass with the possession but only by exercise of the authority conferred in said power of attorney, as heretofore discussed, which power should be evidenced by some proper assignment or transfer in writing signed by Berry & Co. No such document was ever executed and hence no title to the certificate passed to the Hanover National Bank and the mere physical custody of it by them for a limited time gave them no more rights, so far as the title was concerned, than would be acquired by a messenger boy or a clerk who might happen to be the temporary custodian of it. Was it by filing the proof of claim? No, because if Berry & Co. had no title to the certificate, as herein argued, then the filing of a proof of claim conferred none on the trustees. It has been held that a stock broker has the right to hypothecate stock *bought on margin* by him for his customer. Yet in such cases the title to the stock vests in the customer immediately upon its purchase subject to the broker's lien for any unpaid balance, and upon payment of such balance the customer is entitled to and may reclaim his certificate.

Union Pac. Ry. Co. *v.* Schiff, 78 Fed. Rep. 216.
Thompkins *v.* Morton Trust Co., 91 App. Div. 274, (N. Y.)
Douglass *v.* Carpenter, 17 App. Div., 329, (N. Y.)

POINT II,

THE BOUGHT NOTICE DID NOT AUTHORIZE THE REPLEDGING OF STOCK PLEDGED AS COLLATERAL

Berry & Co., after executing an order to purchase or sell stocks, delivered to the customer a "Bought Notice" (Ex. C. R. Pg. 89), which it is claimed gave Berry & Co. the right to hypothecate Hall's certificate. This contention is hardly tenable, because Hall's contract is evidenced by the receipt (Ex. B. R. Pg. 89), which cannot be subsequently altered or changed to affect Hall's rights

without his consent, and this contract was never changed, altered or modified. It seems clear, therefore, that Be[illegible] & Co. could not later substitute a new agreement so far as it related to the certificate in question whatever its effect may have been upon the stock bought by Berry & Co. and noted in the "Bought Notice". Assuming however, for the purpose of this argument, that the "Bought Notice" was in fact the contract, Berry & Co. thereby acquired no right to repledge Hall's certificate. The material portion of said notice may be conveniently divided into two parts as follows:

1. "It is agreed that Jacob Berry & Co. is appointed as agent to receive and deliver stocks, bonds, securities or commodities *bought or sold for my account* with power to hypothecate, rehypothecate, pledge or repledge or loan *any of said stocks*, bonds or securities, or commodities therefor and to substitute similar certificates, and

2. "The said Jacob Berry & Co. are authorized *upon the approximate exhaustion of margin* without notice to me to *buy or sell as the case may be any stocks*, bonds, securities or commodities *held by them for my account as collateral* for margin or otherwise, provided such purchases or sales are made upon the *Consolidated.....Exchange of New York*", etc.

The first of the said parts relates solely to stocks, etc., *bought or sold* by Berry & Co., and the second to stocks held as *collateral* which distinction was recognized by the Circuit Court of Appeals in its opinion (R. Pg. 98). The "Bought Notice" at the most gave Berry & Co. the right, upon the approximate exhaustion of Hall's margin, to *sell* the certificate of stock in question, and then only at specifically designated places, which does not include the Hanover National Bank. Hall's margin was never exhausted and his stock was never sold.

POINT III.

HALL BY FILING HIS PROOF OF CLAIM DID NOT MAKE AN ELECTION OF REMEDIES OR WAIVE HIS RIGHT TO RECLAIM HIS CERTIFICATE

At the first meeting of creditors, December 19, 1904, Hall filed a proof of claim Exhibit E (R. Pg. 91) which contained the reservation, that

"*Said deponent hereby stipulates that by filing a notice of this claim he does not waive any right of action that he now has to recover possession of said certificates* or the value thereof against either of the bankrupts, or any person in whose possession *they may be found*, or any right of action that he has against either or both of said bankrupts for the conversion of said certificates to their own use when said bankrupts knew that said certificates were not their property and never had been, and that the said deponent does not waive any right whatsoever of any kind, nature or description, against the said bankrupts, or either of them, for or on account of the failure of the bankrupts, or either of them, to return said certificates to said deponent and for the unlawful hypothecation and conversion of the same by the said bankrupts, or either of them."

At said meeting Hall represented a large number of creditors whose powers of attorney he held and which now form part of the files in the bankruptcy court, and, as such attorney, and in obedience to the duty due his clients, participated actively at said meeting, at which the Referee announced (R. Pgs 87-88):

"An informal ballot (would be taken) for the purpose of obtaining an expression of opinion, not to be counted for the election of Trustee, and that a short adjournment would be taken for the purpose of examination of claims, and that the formal election of Trustee would occur on the 21st day of December."

Hall, relying on this announcement, did vote his claim on this informal ballot.

This vote was not counted in the election for trustee and on a subsequent day at another session, when the formal vote for trustee was taken *Hall did not vote upon his own claim*, (*R. P. 88*). As there is no provision in the bankruptcy law for a Referee holding informal ballots, or other moot proceedings, the effect of the informal ballot in the case at bar is nil and should not be here considered any more than if it had never been taken, even the Referee himself characterized this informal ballot as an "Abortive attempt to elect a trustee" (R. Pg. 28).

Hall, as soon as he knew where his certificates were, brought reclamation proceedings, and has, through an order of Court in this bankruptcy proceeding, received ninety shares of stock which were deposited by him as collateral and some of which certificates are enumerated in the receipt Exhibit B. (R. Pg. 89). The trustees contend, that in filing the proof of claim Hall elected to come in as a general creditor and waived his right to reclaim his stock. The question of election is largely one of intention. It is apparent from Hall's proof of claim that he intended to secure possession of his certificate if possible from "any person in whose possession they (it) may be found," and his subsequent acts, as well as his presence in this court, support this view. Clearly from the use of the words "in whose possession they (certificates) may be found" Hall did not know where his certificates were when his claim was filed, and it is significant that the trustees did not bring to the attention of the Court until March 21, 1905, (R. Pgs. 7-12) three months after their election, that the certificates in question were in their hands. The record discloses nothing to indicate that when Hall filed his claim or attended said meetings, he had any knowledge as to the location of his certificates, who had them, or that they were even in existence. Hall did not vote his claim at the election of a trustee and has made every effort to recover his stock, being successful in reclaiming ninety out of one hundred shares, which he deposited as collateral security, and the Referee in Bankruptcy, the District Court, and the Circuit Court of Appeals have all successively held that he is entitled to the certificate now held by the trustees.

If Hall had made no effort to secure his certificate after obtaining knowledge as to its whereabouts then it might have been deemed an election, and again, if the filing of the proof of claim was an election, perhaps the trustees can enlighten this Court as to why they allowed Hall to have the other ninety shares of stock held as collateral and delivered by them to him after the filing of said proof of claim. The courts hold that the filing of a proof of claim which substantially states all the facts and contains a notice that the claimant intends to reclaim his stock is no waiver of his right to bring a proper reclamation proceeding.

In Mould *v.* The Importers' and Traders' National Bank, 72, App. Div. 30, (N. Y.) the facts were very similar to those in the case at bar, being an action to recover a certificate deposited with brokers as collateral security for the payment of money advanced for the purchase of other stock, and in turn deposited by the brokers with the defendant bank as collateral security for a loan to themselves. The brokers became insolvent, made a general assignment and subsequently were adjudged bankrupts. The plaintiff, besides bringing his action to reclaim his certificates, filed a proof of claim with the trustee in bankruptcy very similar to the one filed by Hall. Judge McLaughlin, writing the opinion of the Court, said at page 34 :

"Nor does the fact that the plaintiff presented his claim to the trustee in bankruptcy prevent the prosecution of this action to recover the stock or its proceeds (Rhinelander *v.* National City Bank, 36 App. Div. 11). This action was instituted, so far as it appears, prior to the filing of such claim, and *if it were not, it would not, in our opinion, make any difference, because the bringing of the action is sufficient evidence of an election upon the part of the plaintiff to pursue this remedy and recover the stock or its proceeds, instead of relinquishing whatever right he might have in this respect and take in place thereof whatever dividend might be made to him as general creditor in the bankruptcy proceedings.*"

The case of Rhinelander *v.* National City Bank, 36, App. Div. 11, N. Y. referred to in the Mould case, was also an action similar to the case at bar and brought to

recover the proceeds of specific stock. The defendant Ayer had left certain stock with his brokers for safekeeping and by them wrongfully pledged with the defendant bank before making an assignment in bankruptcy. The bank had sold the stock, paid itself in full and had a cash balance. Ayer filed a claim (see Appeal Book, App. Div., First Dept., Vol. 271, N. Y. Bar Association) similar to Hall's proof of claim, prior to joining in the action to reclaim the balance of the proceeds of his stock from the bank, and it was contended, as it is here, that he had thereby made an election of remedies and waived his right to reclaim the proceeds of his stock. The Court held, however, that the mere filing of his claim was no election of remedies and no waiver.

An analysis of LeMarchant *v.* Moore, 150 N. Y., 209, upon which the trustees rely, shows clearly that the Court did not consider the filing of a claim such as Hall's to be an election of remedies and a waiver of his right to reclaim his stock. In that case L. & Co. bought and paid for 200 shares of stock through E. & Co., who in turn purchased the stock through M. & S. 100 shares were delivered. E. & Co. failed and made an assignment. L. & Co. demanded the stock from M. & S., but M. & S. sold it, satisfied their lien, and gave the assignee of E. & Co. the cash balance of $5,324.66, and in addition 1,100 shares of B. A. L. stock. Thereupon L. & Co. filed a claim with the assignee in the following form (see Appeal Book, Court of Appeals, Vol. 45, N. Y. Bar Association):

"I, Gaspard Farrer,.....do swear that said Bliss & Tobey, surviving members of the firm of Evans & Co., insolvent debtors.....at and before the date of such proceedings was and still is justly and truly indebted to our said firm in the sum of $16,802.90, according to the account hereto annexed, marked 'A,' for which sum or any part thereof our said firm has not, nor has any other person to our said firm's use to my knowledge or belief received any security or satisfaction whatever beyond what has been disposed of agreeably to law."

The account marked "A" shows that the $16,802.90 represented the full amount due L. & Co. from E. & Co.,

including the proceeds of the sale of the 100 shares of stock by M. & S. On its face the claim is an absolute one for the full amount due L. & Co., and the only hint of a reservation is the following endorsement on the back: "The within claim is offered for proof for the sum of $11,047.12. Gaston & Snow, Attorneys for L. & Co." Notwithstanding this apparently absolute claim it was held that L. & Co. could recover from M. & S. the difference between the said sums of $16,802.90 and $11,047.12. In brief, the endorsement was a sufficient reservation and no rights against M. & S. had been waived for the difference, but only to their right to have the proceeds from the sale of said B. A. L. stock applied to their claim, because they had said nothing about that in their proof of claim. How much stronger is Hall's case, where the reservation is set out distinctly, clearly and unequivocally. The case of LeMarchant *v.* Moore, instead of being an authority against our position is of the strongest kind in favor of the contention that Hall did not make an election nor waive his right to recover his stock.

The cases cited by the trustees in their brief on the general points of election of remedies are clearly not in point, and comment upon them is deemed unnecessary.

Hall never intended to give up his right to reclaim his stock and did nothing that could be so construed and the foregoing cases clearly hold that upon similar facts what Hall actually did was neither an election nor a waiver.

POINT IV.

THE TRUSTEES CANNOT NOW TRANSFER SAID CERTIFICATE

It is contended on behalf of Hall that the trustees under the power of attorney have no authority to transfer said certificate of stock at this time so as to give title thereto, because said power of attorney was given to Berry & Co. and was not exercised by them, and cannot now be enlarged to include the trustees, especially as

they have no claim against Hall to which the proceeds of the sale of said certificate may be applied.

There are other points involved in the case at bar which are common to all of the respondents, and to avoid duplication of briefs, have not been touched upon herein, but have been discussed at length in the briefs filed upon behalf of the other respondents. By permission of the learned counsel who have prepared these briefs, I most respectfully refer your honors thereto for discussion of such points, as well as to my brief [pages 2, 3, 4 and 5], filed in this Court in reply to the petitioners' motion for a writ of certiorari, for a discussion of the point that there is no conflict between the decisions of the Circuit Court of Appeals of the Second Circuit in the case at bar and the Circuit Court of Appeals for the First Circuit *in re* Swift, *et al*, 112 Federal Reporter, 315.

The decree of the Circuit Court of Appeals for the Second Circuit should be affirmed with costs, so far as it relates to the claim of George E. Hall.

Respectfully submitted,

GEORGE E. HALL,

Respondent.

THOMAS v. TAGGART.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 197. Argued January 17, 20, 1908.—Decided April 6, 1908.

Richardson v. *Shaw*, *ante*, p. 365, followed to the effect that as a general rule the broker is the pledgee and the customer the owner and pledgor of stocks carried on margin.

Where there is a repugnancy between the printed and written provisions of a contract, the writing is presumed to express the specific intention of the parties and will prevail. In this case the written portion on the receipt given for stocks, deposited with the broker as collateral on account, was held as specially applicable thereto and that the broker's right to rehypothecate stocks under the printed portion of the contract was confined to the stocks purchased and carried on margin.

If title to property is good as against the bankrupt or his creditors at the time the trustee's title accrues, title does not pass, and the owner of the property is entitled to have it restored to him, or, if it has been sold, the proceeds thereof.

Shares of stock held by a broker as collateral for the account of a customer, upon which the latter is not indebted to the broker, are the property of

the customer, and, as the trustee has no better right thereto than the bankrupt, the customer is entitled to their possession; and this right is not affected by the fact that the broker had hypothecated the shares. In such case the customer is entitled to the shares, or their proceeds, when returned to the trustee if the loan has been paid by proceeds of other securities pledged therefor.

Proof of claim of a customer against a broker, including value of securities deposited as collateral, does not amount to a waiver of his right to recover possession of the specific stocks, if found, where his claim specifically states that he does not waive such right of possession.

149 Fed. Rep. 176, affirmed.

THE facts are stated in the opinion.

Mr. Abram I. Elkus, with whom *Mr. Carlisle J. Gleason* was on the brief, for petitioners.

Mr. Graham Sumner and *Mr. George E. Hall*, with whom *Mr. Thomas Thacher*, *Mr. Edwin M. Lawrence*, and *Mr. Hugo S. Mack* were on the briefs, for respondents.[1]

MR. JUSTICE DAY delivered the opinion of the court.

This case was argued and submitted with *Henry Richardson, as Trustee in Bankruptcy*, v. *John M. Shaw and Alexander Davidson*, No. 122, just decided, *ante* p. 365. To the extent which the case involves the same general questions as to the legal relations of stockbrokers and customers, we need not repeat the discussion had in *Richardson* v. *Shaw*, by which the conclusion was reached that under the usual contract for a speculative purchase of stock the customer is considered the pledgor and the broker the pledgee.

In this case it is necessary to notice certain specific features not arising in the case just referred to. The petitioners, Edward S. Thomas, Lloyd M. Howell and Ashbel P. Fitch, are the trustees in bankruptcy of Jacob Berry and Harold L. Bennett, individually and as partners as Berry & Company. Several persons, among others Anna D. Taggart, Harris Filson, William C. Bowers and George E. Hall, made claims to re-

[1] Argued simultaneously with No. 122, *Richardson* v. *Shaw*, *ante*, p. 365.

cover certain certificates of stock, as against the trustees in bankruptcy, or to have a lien on the funds, the proceeds of other stocks in the hands of the trustees. The claims were referred to a referee in bankruptcy, and, upon hearing, he found in favor of certain of the claimants, among others Mrs. Taggart, Filson, Hall and Bowers. The report of the referee was confirmed by the District Judge on October 4, 1905, and the trustees were directed to turn over certain certificates of stock and proceeds of other certificates to the claimants. Upon appeal the order and judgment of the District Court was affirmed by the Circuit Court of Appeals for the Second Circuit, *sub nomine In re Berry*, 149 Fed. Rep. 176, and the case is now here upon a writ of certiorari.

From the findings of the referee it appears that certificates of stock were pledged with the Hanover National Bank by Berry & Company the day before the failure. This pledge was to secure a demand loan of $45,000. Subsequently the bank returned to the trustees all funds and stocks over and above its loans. It returned in cash $6,310.41 and certain shares of stock.

Taking up the several claims, we will first notice that of Anna D. Taggart. She claims two certificates for 83 shares of United States Steel stock preferred, which were returned by the Hanover Bank unsold to the trustees in bankruptcy. The receipt given to Mrs. Taggart at the time of the deposit is in the words following:

"SEP. 14, 1904.

"Received from Anna D. Taggart 83 shs. U. S. Steel pfd. No. A30563–c15546. The same to be a general deposit and this receipt is given and received with mutual understanding that Jacob Berry & Co. may hold the same as margin and as a security for or apply the deposit in part payment of or account of losses or any other transactions in the purchase or sale of stocks, bonds, securities or commodities made by them for your account.

"This receipt is given and received upon the further under-

standing and agreement in consideration of Jacob Berry & Co. executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone; that the said Jacob Berry & Co. may repledge, rehypothecate or loan any or all of said stocks, bonds, securities or commodities held by them on account thereof as margin or otherwise may substitute similar stocks, bonds, securities or commodities therefor, and that said Jacob Berry & Co. may, without notice upon the approximate exhaustion of margin sell, or buy, as the case may be, any stocks, bonds, securities or commodities bought and sold or held by them as collateral, or margin, or otherwise, and that in case of contracts for future delivery that said Jacob Berry & Co. may close the same by purchase or sale as the case may be, without notice, provided however, that such purchases or sales may be made upon the Consolidated Stock and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or in any other exchange in the City of New York where such stocks, bonds, securities or other commodities are dealt in.

"No. A30563—33 Shs.

"No. C15546—50 "

"GEO. M. DAVIS, *Mgr.*"

Across the face of this receipt was written, in ink, the words "as collateral on account." The question is, Mrs. Taggart not being indebted to the trustees, but having a balance due from the estate to her, did these shares of stock belong to the trustee in bankruptcy as part of the bankrupt's estate, or were they the property of the claimant, Mrs. Taggart? The learned Court of Appeals construed the receipt as consisting of two parts—the first paragraph relating to the shares of steel stock especially deposited, and the second to the stocks, bonds and securities or commod ties purchased upon her account by the brokers, concerning which they were given the right to repledge, rehypothecate or loan, and the right to substitute therefor similar stocks, bonds and securities.

In *Richardson* v. *Shaw*, *ante*, p. 365, we have discussed the legal relation existing between a customer and a broker who has the right to pledge and hypothecate securities purchased for the customer and substitute similar securities therefor, with the obligation to respond at all times to the demand of the customer for the redemption of the stocks, and we need not here repeat what is therein said.

We are of the opinion that the Circuit Court of Appeals correctly construed this receipt. It was the evident purpose of the parties that the eighty-three shares of United States Steel stock preferred was to be held, as the receipt shows, as security for losses in purchase or sale of stocks, bonds or securities on account of the customer, and the separate paragraph of the receipt, giving the right to repledge, etc., and substitute similar stocks, bonds and securities, had reference to the stock, securities, etc., obtained in executing the orders for purchase made by the customer. And this construction of the receipt is, we think, placed beyond contradiction when effect is given to the words written across the face of the printed receipt as "collateral on account." It is a well-settled rule of law that if there is a repugnancy between the printed and the written provisions of the contract, the writing will prevail. It is presumed to express the specific intention of the parties. *Hagan* v. *Scottish Insurance Co.*, 186 U. S. 423.

This being the situation as to Mrs. Taggart's claim, we think the court properly held that she was entitled to recover her shares of stock. They were not the property of Berry & Company, but were held as collateral to her account upon which she is not indebted to the brokers. The certificates were returned to the trustees, who had no better right in them than the bankrupt.

The rule is generally recognized that if the title to property claimed is good as against the bankrupt and his creditors at the time the trustee's title accrued, the title does not pass and the property should be restored to its true owner; or, if the property has been sold, the proceeds of the sale takes the place

of the property. Loveland on Bankruptcy (3d ed.), § 152; *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344.

We will next consider the claim of Harris Filson.

Filson claims a lien on the fund as the owner of two certificates for ten shares each of preferred stock of the Atchison, Topeka and Santa Fé Railroad Company.

Filson identified the certificates by their numbers and produced Berry & Company's receipts therefor. The bankrupts, Berry & Company, had hypothecated them with the Hanover Bank, which sold them for $2,072.50, which the claimant seeks to recover.

The master finds that Filson had a speculative account with Berry & Company, and "was trading on both sides of the market." On the morning of November 25, his account showed that he had bought on margin, 70 shares of stock, including 40 shares of Pennsylvania Railroad, and that he had sold "short" 50 shares of stock, including 20 shares of "Atchison preferred," and 10 shares of "Erie, first preferred." The account also showed a cash credit of $3,105.97. The claimant testified that he called at the office of Berry & Company on November 25, to arrange to take out of the account the 40 shares of Pennsylvania, which he had previously bought on margin on November 17. He took with him one of the ten share certificates of Atchison, Topeka and Santa Fé, and asked the cashier to figure up the account and let him know if the deposit of the Atchison certificate would leave sufficient margin to withdraw the Pennsylvania stock. He was told that it was not sufficient, as the withdrawal of the Pennsylvania stock would leave a credit balance of only $300 or $400. Filson then went to his safe deposit box and took out two additional certificates for 10 shares of Atchison and 10 shares of Erie, and delivered them, together with other certificates, to Berry & Company on their usual receipt, which was, in form, the same as the receipt given to Mrs. Taggart, above quoted.

The next day Berry & Company failed, Filson never re-

ceived his Pennsylvania stock, and on November 26 no certificate of Pennsylvania stock came into the hands of the receiver in bankruptcy, nor was deposited in any bank as collateral.

Upon the principles stated, we are clearly of the opinion that Filson had a valid claim for the value of his shares of Atchison stock in controversy.

As to two shares of New York, New Haven and Hartford stock, claimed by William C. Bowers, the facts require no additional discussion. These shares were pledged and the same receipt given as above described. The shares were pledged to the Hanover Bank and returned unsold to the trustees. As Bowers was not indebted on the account for which they were held as security, the shares belonged to him.

George E. Hall seeks to recover a certificate for ten shares of common stock of the United States Steel Corporation, returned to the trustees by the Hanover Bank, unsold.

On November 1, 1904, Hall deposited certain securities, including the steel stock, with the New Haven manager of Berry & Company, and took a receipt, specifying that they were held "as collateral." Berry & Company hypothecated them with the Hanover Bank. Hall had a speculative account with Berry & Company at the time, and the securities were deposited in lieu of cash margin for the account. By a prior order in the bankruptcy proceeding the claimant has recovered from the trustees certain stocks found to be his property, but which had not been hypothecated with Berry & Company.

No lien or claim on the stock in question is asserted by the trustees, and Hall was not indebted to Berry & Company on November 25, 1904. Hall filed a claim in bankruptcy on December 19, 1904, for $1,850, which included the value of all his stocks in the hands of Berry & Company, valued at $1,600, and a cash balance of $250 due him. In the proof of his claim, Hall sets forth the following statement relative thereto:

"Said deponent hereby stipulates that by filing notice of this claim he does not waive any right of action that he now

has to recover possession of said certificates or the value thereof against either of the bankrupts or any person in whose possession they may be found, or any right of action that he has against either or both of said bankrupts for the conversion of said certificates to their own use, when said bankrupts knew that said certificates were not their property, and never had been; and that the said deponent does not waive any right whatsoever of any kind, nature or description against said bankrupts, or either of them, for or on account of the failure of the bankrupts or either of them to return said certificates to said deponent, and for the unlawful hypothecation and conversion of the same by said bankrupts, or either of them."

In this claim the essential question is as to the effect of Hall's proof of his claim in bankruptcy as a waiver of his right to recover the shares of stock covered by the receipt. We are of the opinion that, in view of the reservation just made, there was nothing in Hall's conduct amounting to an election to pursue his claim as a creditor in bankruptcy, which now prevents his recovery of the certificates of stock in question. It is true that he voted at the first meeting of the creditors on December 19, 1904, upon an informal ballot for trustee in bankruptcy, and at the formal election of trustees on December 21, 1904, Mr. Hall did not vote, though the referee finds that he participated actively at the meetings held for the election of trustee. We are of the opinion that the reservation of Hall evidenced his intention to hold on to whatever rights he had in his shares of stock, and there is nothing in his conduct which should preclude him, after he had discovered that the shares had been returned to the assignee in bankruptcy, from reclaiming them as his own property.

We find no error in the judgment of the Circuit Court of Appeals for the Second Circuit, and the same is

Affirmed.